STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-23, SUB 50

In the Matter of Blue Ridge Electric Membership Corporation, Complainant, v. Charter Communications Properties, LLC Respondent.	)	**NCCTA's POST-HEARING BRIEF AS *AMICUS CURIAE***

Amicus curiae the North Carolina Cable Telecommunications Association ("NCCTA"), by and through its undersigned counsel, submits this Post-Hearing Brief in the above-captioned matter.

The fundamental issue presented by the parties in this proceeding relates to the appropriate interpretation of N.C. Gen. Stat. § 62-350 ("Section 62-350"), which provides a right of access by communications service providers to cooperatively- and municipally-owned utility poles on reasonable terms and conditions. This issue is the same basic issue presented in the four proceedings recently resolved by orders of the Commission dated January 9, 2018. *See* Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-43, Sub 88 (JOEMC); Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-49, Sub 55 (SYEMC); Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-55, Sub 70 (CCEMC); Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-39, Sub 44 (Union Power). NCCTA believes that the orders in these prior proceedings were

well-reasoned, in the public interest, and in accord with the statutory requirements of G.S. 62-350. As this case arises from similar facts and presents the same underlying legal issue, NCCTA urges the Commission to apply the same approach to this proceeding as it did in the prior cases.

The Commission's decision on this issue is of vital importance to NCCTA and its member companies, as access to utility poles on reasonable terms and conditions is fundamental to the provision of advanced communications services that consumers expect today. Yet, over the last decade, the issue has proven intractable as NCCTA's members have tried unsuccessfully to achieve some level of certainty and predictability in their negotiations with the electric co-ops.

Before 2009, when Section 62-350 was enacted, municipalities and electric cooperatives across the state were increasingly taking advantage of the gap in federal law to extract unjust and unreasonable attachment rates and to impose unfair terms and conditions. In 2007, Time Warner Cable first sought judicial relief from those excessive rates under North Carolina common law, but the United States Court of Appeals for the Fourth Circuit concluded that the remedy, if any, was with the North Carolina legislature and not common law. *Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 315 (4th Cir. 2007). Shortly thereafter, the General Assembly acted to fill the vacuum in federal law by enacting Section 62-350. The statute recognized the right of communication service providers to attach to poles owned by electric co-ops and cities and authorized, first, the Business Court, and, later, this

Commission[1] to "adjudicate disputes" presented under the statute to effectuate just and reasonable terms and conditions.

In 2010, Time Warner Cable sought redress under the new statute in a dispute with the Town of Landis. In 2013, prior to resolution of the *Landis* case, Rutherford sought redress under the statute in a dispute with Time Warner Cable. Ultimately, the Business Court resolved both cases under Section 62-350, concluding that a rate calculated under the FCC's rate formula provided just and reasonable compensation to the cooperative prior to its amendment in June 2015. *See Rutherford Elec. Membership Corp. v. Time Warner Entertainment-Advance/Newhouse P'ship*, No. 13-CVS-231, 2014 NCBC 20, 2014 WL 2159382 (N.C. Super. Ct. May 22, 2014), *aff'd* 771 S.E.2d 768 (N.C. Ct. App. 2015); *Time Warner Entertainment-Advance/Newhouse P'ship v. Town of Landis*, No. 10-CVS-1172, 2014 NCBC 25, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014). Each decision was reached after extensive discovery and bench trials before the Business Court.

As it did in the decisions issued January 9, 2018, NCCTA urges the Commission to give meaning and effect to the reasonable regulation of pole attachment negotiations embodied in Section 62-350 by adopting and applying the federal pole attachment methodology, which is widely-accepted, time-tested, and best suited for balancing the interests at stake. The findings and conclusions of the Commission as to the methodology applied in these prior cases apply equally to this case, and consistency in the analytical approach to these issues will advance the interests of all the stakeholders in achieving certainty and predictability in resolving pole attachment disputes. A contrary decision

[1] The General Assembly amended Section 62-350 in June 2015 to reassign exclusive jurisdiction from the North Carolina Business Court, which had raised concerns about its rate-setting authority, to the Commission. *See* S.B. 88, N.C. Session Law 2015-119 (2015).

would only cause confusion among would-be attachers as well as pole owners and would serve to protract and exacerbate negotiations between the parties. In this regard, consistency in approach is critical to the establishment of an environment that is conducive to productive and successful negotiations by the stakeholders without the necessity of Commission intervention.

For additional information concerning the background and interpretation of Section 62-350 and the reasons supporting the Commission's decision in the prior cases to adopt the FCC rate methodology, NCCTA respectfully requests that the Commission take notice of the arguments and authorities cited by NCCTA in its Post-Hearing Brief as *Amicus Curiae* filed September 12, 2017, in Docket Nos. EC-43, Sub 88; EC-49, Sub 55; EC-55, Sub 70; and EC-39, Sub 44, attached hereto and incorporated herein by reference.

For these reasons set forth herein and in the materials incorporated by reference, NCCTA respectfully requests that the Commission adopt the FCC rate methodology in light of the record in this proceeding conclusively demonstrating that use of this methodology will produce just and reasonable pole attachment rates.

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

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CERTIFICATE OF SERVICE

I certify that a copy of NCCTA's Proposed Post-Hearing Brief as *Amicus Curiae* has been served by electronic mail on counsel of record in this proceeding.

This 4th day of April, 2018.

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-43, SUB 88
DOCKET NO. EC-49, SUB 55
DOCKET NO. EC-55, SUB 70
DOCKET NO. EC-39, SUB 44

Time Warner Cable Southeast LLC,	)
Complainant	)
v.	)
	)
Jones-Onslow Electric Membership Corporation,	)
Respondent	)
	)
	)
Time Warner Cable Southeast LLC,	)
Complainant	)
v.	)
	)
Surry-Yadkin Electric Membership Corporation,	)
Respondent	)
	)
	)
Time Warner Cable Southeast LLC,	)
Complainant	)
v.	)
	)
Carteret-Craven Electric Membership Corporation,	)
Respondent	)
	)
	)
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	)
Time Warner Cable Southeast LLC,	)
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NCCTA'S POST-HEARING BRIEF AS *AMICUS CURIAE*

Amicus curiae the North Carolina Cable Telecommunications Association ("NCCTA"), by and through its undersigned counsel, submits this Post-Hearing Brief in the above-captioned matters as follows.

INTRODUCTION

At issue in these proceedings is whether an electric membership corporation may, consistent with N.C. Gen. Stat. § 62-350 ("Section 62-350"), use its ownership of critical infrastructure to exact excessive rental rates from communications providers who, without reasonable access to that utility-owned infrastructure, will be deterred in their efforts to provide service to the public. This is of particular concern with respect to the areas served by the EMCs—which typically are rural, less-populated, and more difficult to serve areas of the state. If the Cooperatives'[1] proposals are accepted it will build a wall around these areas making it effectively impossible to provide new services in these areas—contrary to the policy goals of Congress and the North Carolina General Assembly to make broadband accessible and affordable to all.

The Commission's decision on how to interpret and apply Section 62-350 is of vital importance to NCCTA and its member companies as well as other providers of telephone, broadband, and cable service. Attached as Exhibits E-G are statements from several small member operators providing service in rural North Carolina describing the detrimental impact of high pole rates on their ability to provide service. NCCTA urges the Commission to give meaning and effect to the reasonable regulation of pole attachment negotiations

[1] "Cooperatives" as used herein refers to the EMCs in the above-captioned proceedings. "TWC" refers to Time Warner Cable Southeast LLC.

embodied in Section 62-350 by adopting and applying the federal pole attachment methodology, which is widely-accepted, time-tested, and best suited for balancing the interests at stake.

Related to the balancing of these interests, at the conclusion of the hearing the Chairman propounded a number of questions related to the application of "value of service" and "externality" rate-setting principles to the issues in dispute, particularly with regard to the status (profit vs. non-profit) of the utility and/or attaching party and the potential impact on broadband deployment and the extent to which the factors could be considered under Section 62-350. For the convenience of the Commission, attached as Exhibit A is a response to these specific questions.

BACKGROUND

The FCC has recognized "that lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services."[2] The State of North Carolina has identified this same barrier.[3]

Access to pole space at "just and reasonable" rates is the lifeblood of the cable industry and of the public's widespread access to broadband telecommunications services.

[2] In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Report and Order, 26 F.C.C.R. 5240 at ¶ 3 (2011). See also Connecting America: The National Broadband Plan at 109, available at http://www.broadband.gov/download-plan/ ("The National Broadband Plan") ("The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment.").

[3] *See* Connecting North Carolina: State Broadband Plan, N.C. Department of Information Technology, Broadband Infrastructure Office, June 21, 2016, at 11 and 13 (referring to high costs of access to poles, particularly in rural areas, as a barrier to deployment).

Recognizing that the owners of these essential facilities, the power companies, had superior bargaining power, in 1978 Congress passed 47 U.S.C. § 224 ("Section 224")—applicable to investor-owned utilities but not cooperatively-organized entities or municipalities. Under this authority, the FCC has adopted a methodology under which cable operators pay a share of the cost of the entire pole in direct proportion to the amount of usable space occupied by the cable attachment.[4]

Before 2009, municipalities and electric cooperatives across the state were increasingly taking advantage of the gap in federal law to extract unjust and unreasonable attachment rates and to impose unfair terms and conditions. With local budgets tightening, and encouraged by consultants to "monetize" their assets, municipalities and electric co-ops increasingly sought to use their ownership of utility poles as a profit center for other operations, knowing that providers would, ultimately, have little choice but to pay up or lose access.

In 2009, the General Assembly filled the vacuum in federal law by enacting Section 62-350 to provide regulation of the pole attachment rates, terms, and conditions imposed by local government utilities and electric cooperatives. The statute (1) mandates that cities and co-ops allow access to poles, ducts, and conduits, and (2) authorizes, first,

[4] *See* 47 U.S.C. § 224(d)(1) and 47 C.F.R. § 1.1409. This is the so-called "cable rate". In response to the amendments in the Telecommunications Act of 1996, the FCC adopted a separate rate for telecommunications attachments which generally resulted in a higher rate. In 2011, the FCC reconciled this disparity by revising the telecom rate so that it aligned with the Section 224(d)(1) rate. *See* Report and Order, FCC 11-50 (rel. April 7, 2011).

the Business Court, and, later, this Commission[5] to "adjudicate disputes" presented under the statute on a "case-by-case basis."

The Business Court resolved two cases seeking the adjudication of the reasonableness of pole attachment rates under Section 62-350 prior to its amendment in June 2015—one involving an EMC[6] and the other involving a municipal utility.[7]

In *Rutherford*, after extensive discovery and a four-day trial, the Business Court rejected the methodologies proposed by the cooperative and its experts (including Gregory Booth, also an expert witness in these proceedings). *See Rutherford*, 2014 WL 2159382, at *12-16. In so doing, the court rejected the cooperative's proposed rates—ranging from $15.50 to $19.65—as unjust and unreasonable. *Id.* Instead, the court found that a rate calculated under the FCC's rate formula provided just and reasonable compensation to the cooperative. *Id.* at *9. The court reasoned that the FCC formula offers "an analytical structure that is well-understood, widely used, and judicially sanctioned," and that the state's reliance on established FCC precedent would "provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions." *Id.* at *10. The North Carolina Court of Appeals affirmed the Business Court's decision. *See* 771 S.E.2d 768.

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[5] The General Assembly amended Section 62-350 in June 2015 to reassign exclusive jurisdiction from the North Carolina Business Court, which had raised concerns about its rate-setting authority, to the Commission. *See* N.C. Session Law 2015-119.

[6] *See Rutherford Elec. Membership Corp. v. Time Warner Entertainment-Advance/Newhouse P'ship*, No. 13-CVS-231, 2014 NCBC 20, 2014 WL 2159382 (N.C. Super. Ct. May 22, 2014), *aff'd* 771 S.E.2d 768 (N.C. Ct. App. 2015) ("*Rutherford*").

[7] *See Time Warner Entertainment-Advance/Newhouse P'ship v. Town of Landis*, No. 10-CVS-1172, 2014 NCBC 25, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014) ("*Landis*").

Similarly, in *Landis*, the Business Court rejected the methodologies proposed by the Town and its expert as irrational and unsupported, concluding that the Town's proposed $18.00 rate was unjust and unreasonable. *See Landis*, 2014 WL 2921723, at *12-13. The court again found that a rate calculated under the FCC formula provided just and reasonable compensation to municipally owned utilities in North Carolina. *See id.* at *10. Referencing the reasoning of its *Rutherford* decision, the court explained that the FCC rate methodology "provides a reasonable means of allocating costs without creating a subsidy from the pole owner to the attacher." *Id.* Landis did not appeal this decision.[8]

Although the forum for resolving disputes under Section 62-350 has now been changed to the Commission, the *Landis* and *Rutherford* decisions remain fully effective and their reasoning is undisturbed by the statutory revisions.

ARGUMENT

I. THE COMMISSION SHOULD ADOPT THE FCC RATE METHODOLOGY AS THE APPROPRIATE METHODOLOGY FOR ESTABLISHING "JUST AND REASONABLE" POLE ATTACHMENT RATES IN THESE PROCEEDINGS.

The parties have proposed alternative methods for determining pole attachment rates—posing a binary choice for the Commission. TWC proposes use of the FCC rate methodology, which allocates the entire costs of the pole (direct and indirect costs, including a return on investment) based on the space used by the attachment. The Cooperatives propose use of a so-called "TVA methodology." The TVA methodology applies the same cost inputs and derives a virtually identical average annual pole cost as

[8] There was, however, an appeal from an order dismissing TWC's complaint for lack of subject matter jurisdiction. This order was reversed by the Court of Appeals and the matter was remanded to the trial court. *Landis*, 228 N.C. App. 510, 747 S.E.2d 610 (2013).

the almost 40-year old FCC method, and the parties here have stipulated to the cost inputs. But TVA allocates those costs in a different way than the FCC method: (1) the TVA approach allocates common costs based on a per-capita allocation among attaching parties, while the FCC methodology allocates common costs using a proportionate allocation based on the percentage of usable space occupied by the attaching party, and (2) the TVA approach allocates the cost of the entire "safety space" to the attaching party, while the FCC methodology allocates the safety space in the same manner as it allocates all of the space on a pole.

Here, the FCC rate methodology achieves the result that the record supports, and it comports best with overall public interest—balancing the interests of the parties, their customers, and the public.

A. The Plain Language and Legislative History of Section 62-350 Show that the General Assembly Intended to Permit the Commission to Utilize the FCC Rate Methodology.

There is no question that the Commission is authorized to adopt the FCC methodology under Section 62-350.

Section 62-350, as originally enacted, designated the Business Court as the exclusive forum for resolving disputes under the new law.[9] After the Business Court questioned whether Section 62-350's directive to establish rates "delegated legislative authority to the judiciary in violation of this state's separation of governmental powers and non-delegation provisions," *see Landis,* at ¶ 20, the General Assembly revised the statute

[9] *See* N.C. Session Law 2009-278.

to designate the Commission as the exclusive forum for resolving disputes under the act.[10] In addition to various conforming changes necessitated by the forum change, the 2015 revisions also deleted language which the cities and co-ops claimed improperly prejudiced the arbiter's decision-making by requiring the arbiter to consider, among other evidence presented by the parties, the "rules and regulations applicable to attachments by each type of communications service provider under section 224 of the Communications Act of 1934, as amended."[11] The revised language replaces this mandatory consideration with language clarifying that the arbiter "may consider any evidence or rate-making methodologies offered or proposed by the parties." *See* N.C. Session Law 2015-119.

To avoid any possibility that the removal of the reference to section 224 of the Communications Act could be read to establish a negative implication against consideration of the federal regulation, the act states: "Notwithstanding the deletion of language referencing the factors or evidence that may be presented by a party in Section 2 of this act [i.e., the section deleting the reference to section 224 of the Communications

[10] *See* N.C. Session Law 2015-119 (2015). The constitutional concern was evidenced in the presentation of S.B. 88 on the House floor. There, the House sponsor, Representative Stam, a lawyer, in reference to the prior version of the statute, explained the change in forum to the Commission: "I've always thought it was unconstitutional, but whether it is or not, extremely unwise, to have a court do something like set rates. That's just not something they teach in law school that courts really can do." *See* Affidavit of Toni Waits Strapp, Attachment, at page 1, lines 37-29 (Exhibit D).

[11] Contrary to the cities' and co-ops' assertion, the *Landis* and *Rutherford* decisions made clear that the court did not interpret the prior version of the statute to require use of, or presumptively apply, the FCC formula—as the N.C. Court of Appeals specifically found on appeal. *See Rutherford,* 771 S.E.2d at 781 ("Rutherford's argument that the Business Court presumptively adopted the FCC Cable Rate as its standard of decision fails because it relies on selective quotations from the order and opinion that distort and ignore the context of its holding. … [W]e conclude that the Business Court did not adopt the FCC Cable Rate as a presumptive standard of decision ….). In other words, as explicitly stated in the decisions and found by the appellate court, the decisions in those cases were not predicated on a belief by the court that it must adopt the FCC formula, but rather by a decision that the FCC formula was a "just and reasonable" approach to setting the rate, superior to the methodologies urged by Rutherford EMC and Landis.

Act of 1934], the Commission may consider any evidence presented by a party, including any methodologies previously applied." N.C. Session Law 2015-119, § 7. The reference to "methodologies previously applied" clearly refers to the *Landis* and *Rutherford* cases as those cases were, and remain, the only decisions applying Section 62-350.

Statements made by the bill sponsors on the House and Senate floor further confirm the plain language of the act. In a colloquy on the House floor, the House bill sponsor, Representative Stam, made clear the effect of the amendment:

> Rep. Bishop: Does this bill impact the authority of the Utilities Commission to use what is generally described as the FCC Formula approach to setting pole attachment rates if it wishes to do so?
>
> Rep. Stam: Rep. Bishop, the answer is "no." If the Commission found such evidence to be relevant, it could be introduced and that approach could be used. The bill gives no preference to that method or any other method that the Commission deems relevant and would produce a just and reasonable result.[12]

The Senate bill sponsor, Senator Brown, made similar comments on the Senate floor in response to questions from Senator Bryant:

> Sen. Bryant: Senator Brown, like many people in here we have had both electric co-ops and electric companies and phone companies and co-ops in our districts and we are committed to each of them, but I know on the phone company side they were concerned as to whether it was your intent that the Utilities Commission would hear these disputes – that you say in the bill that all evidence can be considered and so, does that include the FCC formula that was a part of – one of the original disputed items? Is that one of the

[12] *See* Affidavit of Toni Waits Strapp, Attachment, at p. 3, lines 21-32 (Exhibit D).

issues that the Utilities Commission can consider?

Sen. Brown: Yes, it is.

Sen. Bryant: And that's your intent?

Sen. Brown: Yes.[13]

These references to legislative intent, while directly on point and compelling, only confirm the unambiguous statutory language permitting the Commission to consider "any evidence or rate-making methodologies offered or proposed by the parties" and section 7 of the Session Law specifically permitting consideration of "methodologies previously applied."

B. Application of the FCC Rate Methodology Will Produce "Just and Reasonable" Rates Within the Meaning of Section 62-350.

The FCC's rate methodology is straightforward, analytically sound and easy to administer: it derives the just and reasonable rate by multiplying the percentage of usable space which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility *attributable to the entire pole.* *See* 47 C.F.R. § 1.1409(e)(l). In other words, the cable operator pays a share of the cost of the entire pole in direct proportion to the amount of usable space occupied by the cable attachment.

One virtue of the FCC rate methodology is that it is animated by the same "just and reasonable" standard set forth in Section 62-350. The statutes' reliance on the same words provides further comfort that the FCC approach was driven by the same underlying statutory directive given the Commission here.

[13] *See* Affidavit of Toni Waits Strapp, Attachment, at p. 7, lines 1-212 (Exhibit D).

It bears emphasis that the FCC's methodology is not the preferred method of the cable industry,[14] but it is unquestionably fair and time-tested. Moreover, the standard has already been adjudged to be a "just and reasonable" approach to setting pole attachment rates for electric co-ops by the North Carolina courts.

The following reasons support the conclusion that adoption of the FCC rate methodology will produce "just and reasonable" rates under Section 62-350 and, by contrast, the TVA methodology cannot be relied upon to derive rates that comply with this standard.

(1) The FCC Rate Methodology Best Approximates a "Competitive Rate" While Ensuring that Co-Ops Recover the Fully-Allocated Costs of Attachment, Without Subsidies.

The basic task before the Commission is to establish prices for wholesale inputs (access to utility poles) to a competitive service (communications services) where there is no competitive market for the input. *See, e.g., Landis*, 747 S.E.2d at 611 (finding that Section 62-350 "endorses regulatory intervention to promote just and reasonable rates"); G.S. § 62-2(a)(1) and (4) (declaring public policy of the state (i) to provide fair regulation of public utilities in the interest of the public, and (ii) to provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices.) This is in the context of overriding public policy that strongly encourages the widespread deployment and availability of broadband services and supports policies that promote a competitive market

[14] The cable industry has advocated for, and would prefer, a method based on incremental costs, as the incremental costs associated with attachment are lower than the fully-allocated costs under the FCC rate methodology and also result in a fully-compensatory rate to the pole owner.

for communications services generally. The General Assembly has spoken directly regarding its intent to create a competitive market in EMC service areas for non-utility services. While it has permitted EMCs to offer competitive telecommunications services and products, *see* G.S. § 117-18.1, it has required that these services be provided through a separate subsidiary and not part of the co-ops' core utility operations free from barrier or subsidy. *See id.* (prohibiting subsidiary from receiving government loans or grants and prohibiting subsidies from the cooperative).[15]

The predominant rate paid for attachment to utility poles in North Carolina and across the country is the FCC rate. Requiring that the co-ops pay rates developed according to the same predominant method will have the benefit of ensuring consistency in pricing which will enable providers to compete on a level playing field, will eliminate distortions in end-user choices among competing technologies, and will incent provider behavior based on economic costs rather arbitrary price differentials—all desired outcomes in a competitive marketplace.

The FCC rate achieves each of these goals. It is the methodology that most closely approximates prices based on cost and free of subsidy. It is a fully-allocated cost approach in that it allocates the entire costs of the pole including indirect costs according to the way direct costs are incurred. *See, e.g., FCC v. Fla. Power*, 480 U.S. 245 (1987) (recognizing

[15] In a similar circumstance—the provision of unbundled network elements—the FCC determined that forward-looking cost were most appropriate to use because prices would be based on such costs if there were a competitive supply of the facilities. This Commission implemented this pricing standard in a series of decisions intending to promote competition in the telecommunications market. The FCC's pricing standard was upheld by the United States Supreme Court. *Verizon Communications v. FCC*, 535 U.S. 467 (2002).

FCC cable rate formula as "fully allocated cost" methodology).[16] This fully allocated approach exceeds incremental costs and ensures that costs that exist for the utility even in the absence of the third-party attacher are recovered from that attacher, making the utility better off than it would be without the presence of the attachment.[17] Accordingly, it does not include any subsidy flowing from the Cooperatives to the attaching party. Courts have repeatedly and consistently found that the FCC approach is fully compensatory and does not provide any subsidy to the cable operator. *See, e.g.*, *Landis*, 2014 WL 2921723, at *50 ("[T]he FCC Cable Rate provides a reasonable means of allocating costs without creating a subsidy from the pole owner to the attacher."); *Rutherford*, 2014 WL 2159382, at *55 ("[F]ar from providing any subsidy to communications providers, the FCC Cable Rate formula actually leaves the utility and its customers better off than they would be if no attachments were made to their poles. The cable attacher pays all direct and measurable (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.").

(2) The FCC Methodology Is Time Tested and Widely Accepted.

TWC has demonstrated that the FCC rate methodology has been in effect for nearly 40 years; that the FCC and the courts have developed an extensive body of case law to clarify how the FCC methodology should be applied in any given situation; that the statute

[16] The term "fully allocated cost" is also sometimes referred to as "fully distributed costs". *See* Report and Order, FCC 11-50, 26 F.C.C.R. 5240 at ¶ 147 (rel. April 7, 2011), at n. 417.

[17] *See* Order Granting General Rate Increase, Docket No. E-2, Sub 1023 (May 30, 2013), Chairman Edward S. Finley, Jr., dissenting in part, at 2-3 ("In ratemaking, a long held principle is that so long as a customer that would otherwise leave the system stays on the utility's system and pays its variable costs plus pays a contribution to the recovery of the utility's fixed costs, all customers will be 'better off' in terms of paying reduced rates.").

and its methodology has been approved time and again by reviewing courts against challenges by pole owners; that it has been endorsed by national groups representing public utility commissions and consumer advocates (NARUC and NASUCA); and that it is utilized in some 45 states, including 11 states that regulate cooperative and/or municipal pole attachment service.

Suffice it to say that the FCC rate methodology is the "gold standard" for setting pole attachment rates—even begrudgingly accepted by the Cooperatives' national trade association as "unimpeachable."[18] We will not belabor the point here.

By contrast the TVA methodology is a novel methodology which has never been adopted by any state or federal regulatory body (other than the TVA[19]) and has not been endorsed by any national organization (other than representatives of the co-ops).[20] Were the Commission to adopt the TVA methodology, it would be standing alone.

(3) The FCC Methodology Has Been Approved by North Carolina Courts as Producing "Just and Reasonable" Rates.

In rejecting rate methodology proposals similar to that proposed by the Cooperatives here (albeit generating rates even lower than proposed here), the Business Court specifically found that the FCC rate methodology would produce "just and reasonable" rates under Section 62-350. *See, e.g., Rutherford*, at *59. The decision in *Rutherford* was affirmed by the Court of Appeals. Given the court's ruling, it can be

[18] *See* Kravtin Responsive Testimony, at 8 and Exhibit PDK-5.

[19] As pointed out in the unrebutted testimony of Ms. Kravtin, the TVA is a unique, special purpose agency which did not adopt its methodology through a notice and comment rulemaking procedure.

[20] *See* Kravtin Responsive Testimony, at 52-53.

said—as a matter of North Carolina law—that the FCC rate methodology produces "just and reasonable" rates within the meaning of Section 62-350. By contrast, the TVA methodology has never been approved by any court, much less a North Carolina court.[21]

(4) The FCC Methodology Best Comports with State and Federal Public Policy Interests in Encouraging the Universal Deployment of Affordable Broadband.

The net effect of the Cooperatives' proposal would be to, effectively, "build a wall" around co-op areas so that it will be exceedingly difficult, if not impossible, to provide wireline broadband services in those areas. This runs directly contrary to the interests of the EMC's own members in receiving these services as well as every expression of federal and state public policy on the issue. The promotion of the widespread deployment of broadband, the elimination of barriers to deployment, and the bridging of the "digital divide" are among the most significant state and national public policy initiatives of current moment. In this light, the Cooperatives' proposal to increase barriers to broadband deployment and make it more difficult to bridge the digital divide is, at best, tone deaf in the extreme and, at worst, an anticompetitive effort to ensure that the EMC service areas are kept free of competitors.[22]

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[21] That no court has yet reviewed the TVA rate method is important, as it is questionable whether, despite the TVA's broad statutory authority, the method could withstand challenge. Both the failure by the TVA to follow the requirements of the Administrative Procedure Act in adopting its pole attachment requirements, and its reliance on facts demonstrably false (such as its understanding that the electric companies do not use the safety space) would raise serious issues for a reviewing court.

[22] At root, the Cooperatives' advocacy in these proceedings can be understood by reference to their fundamental desire to be "left alone"; *i.e.*, they have made it abundantly clear that they prefer that no entity be permitted to attach to their utility poles. However, for sound reasons grounded in public policy, the General Assembly has resolved this question in favor of access, and the Cooperatives should not be permitted to undermine this legislative determination through the artifice of regulation.

The co-ops themselves have identified rural broadband deployment as a priority as they reported to all their members in a report prepared by their state trade association: "Electric cooperatives sat down with Governor Roy Cooper for an initial meeting June 19. The group discussed issues important to electric co-ops and the communities they serve: …. *Rural communications*, including the need for broadband infrastructure in rural communities." *Carolina Country*, published by NC Electric Cooperatives, August 2017, at 9 (*available at* https://www.carolinacountry.com/digital/union/2017-08.htm). Similarly, the North Carolina Rural Electrification Authority, the state body that oversees EMCs, has recognized: "Access to broadband has become essential for the social and economic benefits it provides to American residents, businesses, governments and communities. Broadband is crucial for increased health, education and economic opportunities, as well as for job and business creation and growth. Broadband can help close the digital divide between rural and urban communities." NCREA 2016 Biennial Report, at 103.

The Governor highlighted this issue as recently as August 30 in a speech at the N.C. Digital Government Summit:

> Right now our state faces a digital divide, and future success requires that North Carolinians in both our rural and urban areas have access to broadband internet. Broadband can increase educational opportunities, develop skills for our workforce, and improve technology for small businesses, and we must make consistent internet access available across our state.

See Press Release, Cooper Calls for Broadband Expansion, Better Cybersecurity at Digital Government Summit, Aug. 30, 2017 (available at: https://governor.nc.gov/news/gov-cooper-calls-broadband-expansion-better-cybersecurity-digital-government-summit); *see also id.* (noting that, according to the N.C. Department of Information Technology, there

are more than 400,000 households in North Carolina without access to high-speed internet services, 89 percent of those in rural areas). Similarly, the Governor has stated:

> Broadband access is a must for economic success in our rural communities. We have already seen how access to high-speed internet has allowed business in rural areas to thrive. We cannot deprive rural North Carolinians of this vital tool for competition in a global marketplace.

Press Release, Cooper's Strong Proposal for Broadband Expansion in your area, May 5, 2017 (available at: https://governor.nc.gov/news/cooper%E2%80%99s-strong-proposal-broadband-expansion-your-area); s*ee also* State Broadband Plan Progress Report, N.C. Department of Information Technology, Joint Legislative Oversight Committee on Information Technology and the Fiscal Research Division, Dec. 7, 2016, at 4-5 ("[B]roadband's benefits are not evenly dispersed and a digital divide . . . is growing. Many communities, typically in sparsely populated or economically-distressed areas lack access to infrastructure or affordable service. . . . . Another area of concern is sufficient competition, which drives innovation and affordability, in many areas of the state . . . .").

Given this, the elimination of "barriers" to broadband deployment—including impediments to access to utility poles—is a significant state and national priority. North Carolina's Broadband Plan—the state's expression of its broadband policy—identifies high pole rates as one of the obstacles to broadband investment and deployment:

> The two major barriers to broadband deployment in NC are the costs of construction (CAPX) and population density . . . . Attaching to poles—typically owned by telephone and electric companies or municipalities—can cost anywhere from $1,500 to $100,000 depending on several factors. Pole owners typically charge an attachment fee anywhere from $0 and $160 per pole. Providers are also responsible for the "make-ready work"—the cost to properly prepare the pole. . . . The CAPX costs greatly influence the business case for deployment in sparsely populated locations. In other words,

> the significant investment it takes to deploy is not offset by customer volume.

Connecting North Carolina: State Broadband Plan, N.C. Department of Information Technology, Broadband Infrastructure Office, (June 21, 2016), at 11. *See also id.*, at 8 ("Communities can lower deployment costs by better leveraging existing infrastructure, easing access to rights-of-ways and poles to facilitate path creation, and investments in next-generation infrastructure."). In this vein, the very first recommendation of the State's Broadband Plan is to "lower barriers to broadband deployment," finding: "Federal and state laws grant rights of access to poles. However, the negotiation process and expense continue to hinder deployment." *Id.*, at 13.

Similarly, the federal government has recognized high pole rates as an impediment to broadband deployment. *See* The National Broadband Plan, at 109, *available at* http://www.broadband.gov/download-plan/ ("The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 . . . to promote broadband deployment."). In its recent decisions rationalizing its various pole regulations so that all attaching parties—including telecommunications providers—pay at approximately the same rate, the cable rate, the FCC stated:

> We agree with commenters who explain that today, the telecom rate is sufficiently high that it hinders important statutory objectives. For example, commenters explain that reducing the telecom rate would improve the business case for providing advanced services, because it will reduce the expected incremental cash outflows of providing such services, thereby increasing the likelihood that the present value of the expected incremental cash inflows will exceed the present value of the expected incremental cash outflows. In addition to reducing barriers to the provision of new services, reducing the telecom rate can expand opportunities for communications network investment, as discussed in greater detail below. *We thus conclude that lowering the*

> *telecom rates will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.*

Report and Order, FCC 11-50, 26 F.C.C.R. 5240 at ¶ 147 (2011) (emphasis supplied) (footnotes omitted) ("*2011 Report and Order*"); *see also id.*, at ¶ 3("lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services").

In his speech in September 2016 establishing his "Digital Empowerment" agenda, then-Commissioner, now-Chairman Pai specifically identified high pole attachment rates as a barrier to broadband deployment in rural areas and highlighted the FCC's lack of statutory authority to address the problem fully:

> [T]he FCC needs to reform its rules governing pole attachments. Remember, before ISPs can offer service to customers, they must string fiber optics, coaxial cables, and/or other wires on utility poles and through underground conduit. . . . If we want more affordable broadband and more competition, *we need to take a fresh look at our pole attachment rates*. We should reduce those rates by excluding capital expenses from the pole attachment formula (currently, ISPs have to pay for a pole owner's capital expenses even when the pole owner has already recovered them separately). . . . *Congress should also expand the Commission's authority over pole attachments. Right now, we don't have jurisdiction over poles owned by government authorities, whether federal, state, or local, nor poles owned by railroads. Unsurprisingly, I have heard from ISPs that many pole-attachment disputes arise from these particular pole owners, who may have little interest in negotiating just and reasonable rates for private actors to access their rights of way. This is a gap that Congress could easily fix.*

Remarks of FCC Commissioner Ajit Pai at the Brandery, "A Digital Empowerment Agenda," Cincinnati, Ohio, Sept. 13, 2016, at 7 (emphases supplied) (*available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf).

Given that the Cooperatives' proposal will have the effect of doubling and tripling the already high rates that are recognized by this state and the federal government as "barriers" to deployment, it is obvious that adoption of their proposal will only exacerbate the problem.

The impact of super-compensatory attachment rates is especially harmful for smaller communications companies that have smaller bases over which to spread costs and many of which are marginally operating to begin with.[23]

For example, one of NCCTA's members, CND Acquisition Corp., provides service in rural, mountain areas of Western North Carolina—Murphy, Andrews and Cherokee County. It is faced with direct competition from an electric co-op in the area, Blue Ridge Mountain EMC, and it has some 2,900 total attachments with two TVA power distributors (Blue Ridge and Murphy Electric Board).[24] CND currently pays about $3.00 per attachment to Murphy Power and $12.00 to Blue Ridge, but it is faced with the prospect of substantial increases if the TVA methodology is adopted. CND worries that it will not be able to expand or upgrade its services if these increases are implemented.

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[23] *See, e.g.*, Comments of NTCA-The Rural Broadband Association, FCC WC Docket No. 17-84 (Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment), June 15, 2017, at 7 ("The Commission should at every turn ensure that pole attachment rates and make-ready costs (like any other critical input to broadband deployment) are just and reasonable and do not impose unnecessary or excessive costs on broadband providers. For RLECs operating in rural areas of the nation with small subscriber bases and rugged terrain, these costs can have a very real effect on the costs of deployment.").

[24] *See* Declaration of David Daniel (Exhibit E).

Similarly, NCCTA member Country Cablevision provides service in Mitchell, Madison, McDowell, and Yancey Counties, including the incorporated communities of Bakersville (357 households), Burnsville (1500 households), and Spruce Pine (1492 households). Its sister company, Carolina Mountain Cablevision, provides service in the unincorporated areas Haywood County. In Haywood County, there are about 5 poles for every 1 customer. Based on the local EMC's current rates, Country Mountain Cablevision pays approximately $6 per month per customer just for pole attachments—which might double or triple if the Cooperatives' methodology is adopted. These high attachment rates are a substantial barrier to the ability of these small, locally operated cable systems to serve new customers in their rural service areas and, if the Cooperatives' proposals are adopted, to even continue serving their existing customers.[25]

Another of NCCTA's members, Red's Cable, provides service in the communities of Bath (176 homes) and Bayview (305 homes). Red's Cable projects that if its pole rate went up to $20.00 (recognizing that the Cooperatives are proposing rates substantially in excess of that), the company's costs would increase to nearly $5.00/month just for attachments. Red's Cable states that neither it, nor its customers, are able to absorb increases of this magnitude.[26]

The Commission must take into consideration these second-order effects on the vital public interest in promoting the availability of broadband services (as well as fostering competition for communications services) as it evaluates the competing proposals in these proceedings. These are precisely the type of considerations the General Assembly intended

[25] *See* Affidavit of Bryan Hyder (Exhibit F).

[26] *See* Declaration of Frank Styers (Exhibit G).

the Commission to weigh in granting the Commission broadband authority to resolve disputes based on the "public interest."

(5) Application of the FCC Methodology Is Most Appropriate to Guard Against Potential Anticompetitive Motivation of Cooperatives Who Are Providing—or Wish to Provide—Competitive Services.

The overall context in which the attaching party's services are being offered cannot be ignored. Increasingly, electric cooperatives are getting into the "triple play" business offering broadband, telephone and video service in competition with traditional private providers.[27] Nearly all, if not all, of the EMCs in North Carolina are currently deploying multi-strand fiber in their distribution plant with the hopes of leveraging the excess fibers for consumer purposes. Others are already in the business. For example:

- Blue Ridge Mountain EMC, which serves two counties in western, North Carolina, entered the broadband business in 2002, has installed over 1,000 miles of fiber, and presently serves some 6,000 customers with broadband. *See* http://www.bbcmag.com/minneapolis/docs/presentations/Tue-Oct-18/Electrical_Co-op/Brinke-Erik.pdf; NCREA 2016 Biennial Report, at 69-70. The co-op currently is providing these services in direct competition with cable companies and telephone companies in North Carolina. *See* Declaration of David Daniel, Exhibit E.

- French Broad EMC offers broadband through a partnership with the Education & Research Consortium of the Western Carolinas, Inc. *See* http://www.frenchbroademc.com/broadband.cfm. Per French Broad's public statements it is in the process of constructing a fiber-to-the-home network, and it received federal funding to support the provision of broadband services to several targeted communities in its service area. *See* Broadband Recovery Funding in NC (available at http://www.ncleg.net/documentsites/committees/HSCHSIARUA/09-10-2010/e-NC%20handouts.pdf); French Broad EMC website at http://www.frenchbroademc.com/bpl/services.cfm.

[27] *See* North Carolina Rural Electrification Authority, 2016 Biennial Annual Report (March 13, 2017) ("NCREA 2016 Biennial Report") (available at http://ncrea.net/2016_Biennial_Report.pdf), at 8 ("The EMCs … understand the importance of Wi-Fi and broadband availability throughout the rural areas of the State.").

- Lumbee River EMC is deploying fiber under a $20 million grant/loan package from the federal government for the purpose of providing "triple play" services (Internet, telephone and television") in its footprint. http://www.lumbeeriver.com/sites/lumbeeriver/files/LREMC/PDF%20Files/Message%20from%20CEO/May%202016.pdf; REA 2016 Biennial Report, at 47. In 2014, Lumbee River EMC began collaboration with Horry Telephone Cooperative to offer broadband, TV and telephone services to residences on the network. The FTTH project will provide broadband service speeds of 100 Mbps or higher and make services available to 11,384 households, 1,634 businesses, and 95 anchor institutions. *See* USDA Broadband Initiatives Program, Awards Report, "Advancing Broadband: A Foundation for Strong Rural Communities," Jan. 2011 (available at https://www.rd.usda.gov/files/reports/RBBreportV5ForWeb.pdf).

- Roanoke Electric Cooperative has undertaken a $4 million investment to deploy fiber across its system. Excess fiber is being deployed in connection with this project "to engage last mile providers of broadband services, and the results are leading toward some expansion of broadband capacity in the region." *See* NCREA 2016 Biennial Report, at 56.

- Piedmont EMC is investing in 166 miles of fiber surrounding its five-county service area (including Orange County) and is interested in selling capacity to other providers and end users. *See* "Rural Internet in Orange County: What You Need to Know," *The News of Orange County* (Aug. 16, 2017).

It is also worth observing that the TVA has its own broadband ambitions. The TVA currently provides regional fiber connectivity for cooperatives that provide broadband services, including Blue Ridge Mountain EMC here in North Carolina.[28] In May 2017, the TVA approved a $300 million project to "modernize" its fiber backbone and make fiber capacity available to "help local communities and rural areas attract and retain jobs." The project includes installing 3,500 miles of fiber "to enable broadband connections for more of TVA's generating plants and as well as more of its customers."[29]

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[28] *See* http://www.bbcmag.com/minneapolis/docs/presentations/Tue-Oct-18/Electrical_Co-op/Brinke-Erik.pdf.

[29] *See* https://www.tva.gov/Newsroom/Press-Releases/TVA-Board-Approves-300-Million-Strategic-Fiber-Initiative.

There is no basis in Section 62-350 or in public policy to put a thumb on the scales of competition in favor of the co-ops. To the contrary, adoption of the FCC methodology will guard against the potential for anticompetitive motivations animating the Cooperatives' policy positions.

(6) Application of the TVA Methodology Will Unduly Disrupt the Communications Services Market

While the Commission is charged with making case-by-case determinations under Section 62-350, the Commission is also obligated to make rational decisions that treat similarly situated parties fairly. In this regard, it is likely that the Commission's decision regarding rate-setting methodology will be applied in future decisions, which could have significant impact throughout the state. Should the Commission grant the Cooperatives' the massive rate increase they are requesting in these proceedings, other co-ops and cities will ask for similar treatment—certainly such a decision would ensure a full docket for the foreseeable future.

There are 31 EMCs providing service to customers in North Carolina—26 that are headquartered in the state and 5 foreign entities.[30] They serve approximately 1 million customers in the state and operate in 93 of North Carolina's 100 counties.[31] They have assets of more than $5.8 billion, and a collectively generate some $3.0 billion in annual revenue.[32] Copied below as Figure 1 is a service map showing the EMCs operating in North Carolina.

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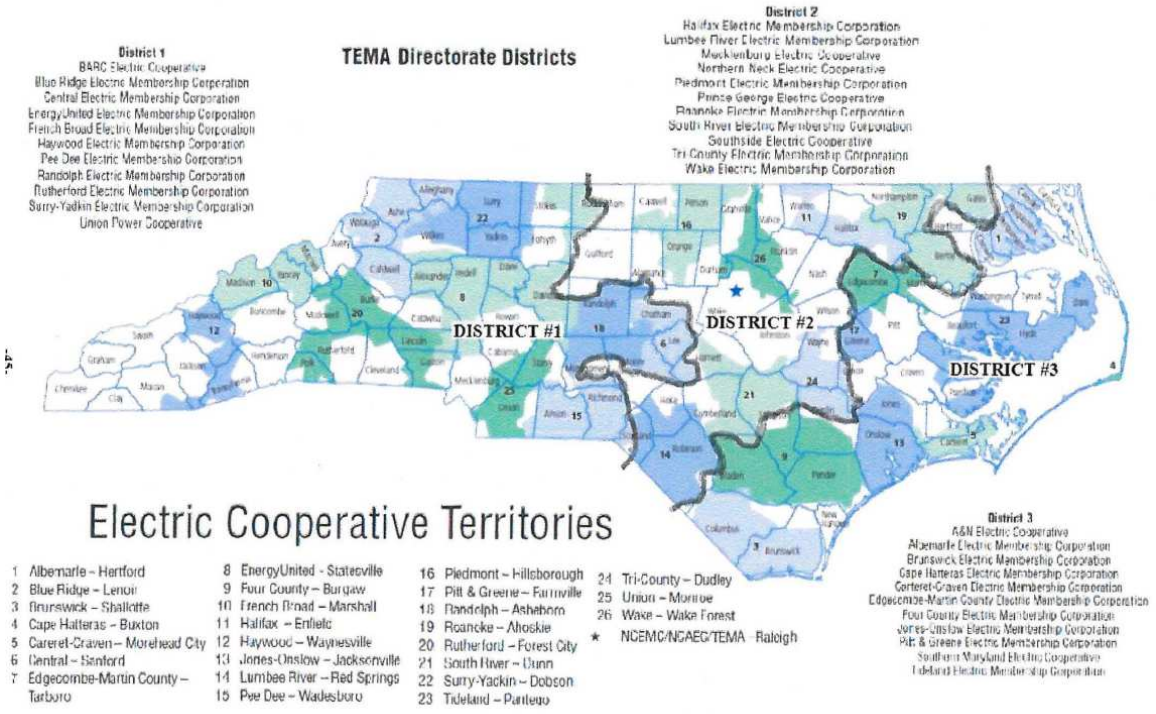
[30] *See generally* North Carolina Utilities Commission, 2016 Annual Report – Vol. XLVII (Jan. 27, 2017), at 50. A complete list of the EMCs and service areas is set forth at Exhibit B.

[31] *Id.* In total they serve more than 2.5 million people in North Carolina. *See* http://www.ncemcs.com/co-ops/stats.htm.

[32] *See generally* http://www.ncemcs.com/co-ops/stats.htm.

Figure 1

North Carolina's Electric Cooperatives



Source: NCUC 2016 Annual Report – Vol. XLVII (Jan. 27, 2017), at 45.

Similarly, there are over 70 North Carolina cities that provide their own power distribution services.[33] This includes major cities such as High Point, Gastonia, Rocky Mount, Wilson, Greenville and Fayetteville. Collectively these "public power" systems service some 1.2 million persons in the state.[34] Each of these cities owns and operates its own electric distribution facilities, including utility poles.

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[33] *See* North Carolina Utilities Commission, 2016 Annual Report – Vol. XLVII (Jan. 27, 2017), at 47. The actual number of cities providing service in North Carolina is larger; there are 93 public members listed on Electricities website, including out-of-state cities providing service in-state. *See* https://www.electricities.com/default/aboutus/ElectriCitiesMembership/MembershipList.aspx In is Petition to Intervene in these proceedings, Electricities stated that it has 88 members. *See* Petition to Intervene of Electricities of North Carolina, Inc., Docket No. EC-49, Sub 55 (July 6, 2016), at ¶ 1. A complete list of the public power members is set forth at Exhibit C.

[34] *See* http://www.over1millionstrong.com/#/press.

Figure 2

North Carolina Public Power Communities

Source: NCUC 2016 Annual Report – Vol. XLVII (Jan. 27, 2017), at 44.

There does not appear to be a public source of information reporting the total number of combined utility poles under the ownership and control of EMCs and cities in the state. However, the 26 North Carolina-based electric co-ops maintain, in the aggregate, more than 98,000 miles of power lines all across the state[35] which equates to nearly 3 million utility poles.[36] If one conservatively assumes that the number of public power poles is around 1 million, based on the differential between the average cable rates and TVA rates proposed in this case, application of the TVA rate could lead to some $102

[35] *See* North Carolina's Electric Cooperatives website, *available at http://ncemcs.com/co-ops/stats.htm.*

[36] Assuming conservatively that there are approximately 30 utility poles per mile of line, *see* THE NATIONAL BROADBAND PLAN at 116 n.5, the electronic co-ops could own or control as many as 2.94 million utility poles in North Carolina. *See also* Arnett Testimony at 43 (Tr. Vol. 2 at 239) (pole per mile averages of 21, 28, and 21 for Carteret-Craven, Jones-Onslow, and Surry-Yadkin).

million per year above and beyond the pole owners' fully allocated rates associated with the pole attachments transferred from attaching entities and their customers to electric co-ops and cities.[37] The magnitude of these cash flows is enormous and would cause disruption and dislocation in the broadband and communications services market throughout the state. Furthermore, the shock of such a transfer would not only be totally unprecedented, but would be explosive. Evidence at hearing showed that many co-ops and cities are currently charging rates well below the rates charged by the Cooperatives in these cases, and none charge rates in the range expected under the TVA method. *See, e.g.*, Responsive Testimony of Nestor Martin, Docket No. EC-39, Sub 44, at NM Ex. 13. Approving the TVA rate method in these cases would undoubtedly encourage many of the co-ops that have kept their pole rates reasonable to increase them by factors of six or seven. Plainly, such a result was not intended by the General Assembly and would not be just and reasonable under the statute.

Conversely, application of the FCC methodology will lead to no such disruptions. Because many EMCs in North Carolina have not attempted to increase their rates materially above the rates derived from the FCC approach, their rates will not be expected to vary significantly if the Commission approves the FCC formula here. The cases before the Commission represent the "worst offenders"; accordingly, adoption of the FCC methodology will not have a disruptive impact on existing rates in most cases.

[37] ((Average Proposed TVA Rate of $31.56) — (Average Proposed FCC Rate of $6.10)) X (4,000,000 poles).

(7) The Fact That the TVA Has Recommended the Methodology Proposed by the Cooperatives Is Entitled to No Weight in These Proceedings.

The TVA methodology was created by the TVA in reaction to matters uniquely applicable to that agency and based on its interpretation of its statutory mandate as solely directed to keeping its distributors' power rates low. That agency has narrow jurisdiction and narrow interests; it is a "special purpose" federal agency—not an agency with general latitude or responsibility to regulate in the public interest.[38]

The TVA has an extremely small presence in North Carolina. Only three EMCs distribute TVA power in North Carolina—Blue Ridge Mountain EMC, Tri-State EMC, and Mountain Electric Cooperative.[39] These entities serve only approximately 33,000 households in small portions of western North Carolina. See https://www.tva.gov/About-TVA/TVA-in-North-Carolina. Each of these entities is based out-of-state and none are parties to the present proceedings. To the extent that the TVA methodology has force or effect, it is only upon their distributors, and the methodology has no applicability here with respect to non-TVA entities and non-TVA territories.

The Cooperatives' proposal to adopt and apply the TVA methodology must stand on its own. Yet the methodology is not supported by the expert testimony of an economist,

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[38] Congress created the TVA in 1933. *See* Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831 *et seq*. The TVA is a unique government agency in that it is structured and operates like a private corporation, but has the power of the federal government. It is responsible for supplying power to cities and communities along the Tennessee River (approximately 80,000 square miles). It operates fossil fuel, nuclear, and hydropower plants, and helps to maintain the nation's fifth-largest river system. It does not receive congressional appropriations; rather its income is derived from the sales of electricity to its distributors and through them to some 8 million customers in addition to direct sales to industrial and government users. *See generally* AllGov.com.

[39] *See* NCUC 2016 Annual Report, at 49. The Murphy Power Board (Town of Murphy) also distributes TVA-generated electricity.

and it is based on factual errors and assumptions that have repeatedly been rejected. *See infra,* Section C. Focusing solely on keeping EMC rates low led the TVA to adopt a methodology that ensured that subsidies would flow from the third party attachers to the pole owners—without concern for ensuring a level playing field for competitors, eliminating distortions in end-user choices between technologies, and incenting provider behavior driven by economic costs rather than arbitrary price differentials. Here the Commission's statutory role is much different and its goal should be to eliminate subsidies—both from and to the pole owners—and to establish pricing that takes into considering these larger public interest concerns to foster a competitive market for communications services.

(8) The Cooperatives Have Presented No Basis for Granting Them Favored Regulatory Treatment.

At root, the Cooperatives' proposal here amounts to a request that co-ops be granted special regulatory favors because they operate on a non-profit basis and that TWC and its customers should be punished because TWC operates on a for-profit basis. There is no support in the text of Section 62-350 for distinctions of this sort, and it would undermine the very public policy the General Assembly sought to advance when it enacted the law if such considerations were to carry the day. These considerations are discussed more fully in Exhibit A hereto (Responses to Questions Designated for Post-Hearing Briefing).

C. The Cooperatives Employ Results-Oriented Methods and Analysis Which Are Analytically Unsound and Inconsistent with Cost Causation Principles.

1. "Avoided Cost" Analysis

The Cooperatives attempt to justify their requests for massive increases in applicable pole attachment rates by reference to "avoided cost" analysis; *i.e.*, they claim that the increases are justified by comparison to the costs otherwise incurred by building duplicative infrastructure.[40] This line of advocacy highlights the absurdity of the underlying proposal. In some circumstances, avoided cost analysis has been utilized by the Commission to set utility rates for certain wholesale services. However, the relevant "avoided costs" to be considered are the costs of the utility—not the costs of the competitor. For example, the costs of collocation for CLPs were not set based on the expense that would have otherwise been incurred by CLPs in building central offices. The fact that it would be expensive for TWC (or any other attaching party) to construct its own poles underscores the importance of setting the pole rates at a competitive level for access to this critical infrastructure.

A discussion of the application of "value of service" concepts to this proceeding is set forth at Exhibit A.

2. Allocation of Unusable Space

The principal difference between the methodology proposed by TWC (the FCC rate methodology) and the Cooperatives (the TVA methodology) is how the methodologies allocate unusable space. The FCC methodology allocates space based on the percentage

[40] *See* Arnett Testimony, at 43.

of usable space occupied by the attaching party. The TVA approach allocates space based on a per-capita allocation among the attaching parties.

The Commission has previously considered and rejected the precise allocation method advocated by the Cooperatives in the closely analogous context of setting prices for collocation by competitive providers of telecommunications services in ILEC central offices. *See Generic Proceeding on the Provisioning of Collocation Space,* Order Addressing Collocation Issues, Docket No. P-100, Sub 133j (Dec. 28, 2001), at 268-273, *aff'd*, Order Addressing Motions for Reconsideration and Clarification, Docket No. P-100, Sub 133j (Aug. 20, 2002), at 118.[41] The methodology approved by the Commission, and applied by the FCC approach, is entirely consistent with the manner in which costs are incurred. Contrary to the Cooperatives' proposed allocation methodology, pole costs do not vary by attacher (keep in mind that "make ready" costs are billed separately), so there is no analytical basis for charging the first attacher 44% of the costs and the second attacher 28% of the costs[42] where the space occupied is identical—nor is there any analytical basis for deviating from the method used to allocate direct costs. *See* 47 C.F.R. 64.901(b)(3)(ii) ("When direct analysis [of common costs] is not possible, common costs shall be allocated

[41] The arguments made by the ILECs in that proceeding were identical to the arguments advanced by the Cooperatives here in favor of the same methodology—*i.e.*, all parties should share equally in the costs. *Compare*, *e.g.*, BellSouth Proposed Order, Docket No. P-100, Sub 133j, at 120 (Feb. 16, 2001) ("This is a reasonable approach because it acknowledges that a party obtains access to the entire central office building, not just its collocation arrangement. … Such access provides equal value to all parties; therefore, all parties should share equally in the costs of security access. This method of allocating costs is simple, easy to administer, and provides access on a nondiscriminatory basis to all parties in the central office.") *with* Testimony of Wilfred Arnett on behalf of the Cooperatives, at 40 ("Cable companies have the same need as every other attacher on the pole to have the pole extend 18 feet, or higher…. Cable companies should therefore pay an equal share of the costs ….").

[42] *See* Kravtin Rebuttal Testimony, at 24 (Tr. Vol 1 at 410) ("TVA itself demonstrated how a rate could double from $17.69 to $34.19 based on differences in the average number of entities, where the space occupied by the attacher and the cost of pole ownership were held constant.").

based upon indirect, cost-causative linkage to another cost category … for which a direct assignment or allocation is available.").

3. Allocation of Safety Space

The other principal difference between the methodology proposed by the parties concerns the allocation of the costs of the so-called "safety space." The Cooperatives' proposal to allocate the entirety of the space to the attaching party has been rejected repeatedly by the FCC and fails the test of logic and fairness.

As long ago as 1979, the FCC dealt specifically with this issue by rejecting requests to allocate the NESC-required safety space to the attaching parties. *See* Memorandum Opinion and Second Report and Order, 72 FCC2d 59, FCC 79-308 (rel. May 23, 1979), at ¶ 24 (noting that the attaching party bears the risk of having to relocate its facilities should the utility desire to install equipment in the safety space, combined with "the common practice of electric utility companies to make resourceful use of this safety space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein"). This decision has been re-examined and affirmed repeatedly since 1979.[43] Again, this approach is consistent with cost recognition principles.

[43] *See* Memorandum Opinion and Third Report and Order, 77 FCC2d 187, FCC 80-90 (rel. March 10, 1980) (reconsideration order affirming decision not to allocate any of the 40-inch safety space to cable attachers as usable space), at ¶¶ 8-11 (rejecting argument that entire 40-inch space should be allocated to cable because "but for the presence of cable on a pole the 40 inch space would not be necessary"); Memorandum Opinion and Order, 56 Rad. Reg. 2d 707, RM 4558, FCC 84-325 (rel. July 25, 1984), at ¶¶ 7, 9-10 (denying petition by several electric utilities seeking revisions in the usable space presumptions based on submitted of a "White Paper" making the same argument that the safety space should be allocated to the attacher); Report and Order, FCC 00-116 (rel. April 3, 2000), at ¶¶ 20-22 (declining request by utilities to decrease amount of usable space from 13.5 feet to 11 feet by reallocating the 40-inch safety space as unusable space)("It is the presence of the potentially hazardous electric lines that makes the safety space necessary ….The space is usable and used by the electric utilities."); Consolidated Partial Order on Reconsideration, FCC 01-170 (rel. May 25, 2001), at ¶ 51 (rejecting request for reconsideration of decision that safety space is usable and used by the electric utility).

The safety space is usable and used by the utility and not the attaching party and reflects the realities of the parties' respective use rights, including that fact that the attaching party will be required to relocate, at its own expense, if the utility desires to use more of the pole, thus effectively moving the safety space so that the attacher's existing attachment is in violation of its requirements. It makes no difference whether the regulatory construct (the NESC's "safety space" requirement) was "caused" by the existence of the current-carrying electric line or the presence of a third party attacher. The salient point, instead, is that the safety space is usable for the utility but is not usable by the attaching party. It would be arbitrary and capricious under these circumstances to assign the cost of this space solely to the party that is unable to use it, while relieving the pole owner, who can and does use the space, of any responsibility paying for that portion of the pole.

D. Adopting the TVA Methodology Will Make the Commission an Outlier.

The choices offered the Commission by the parties in these proceedings lead to drastically different real-world impacts. One the one hand, TWC proposes an approach that is widely applied and accepted, fully vetted, approved by the courts—i.e., it will put the Commission comfortably in the mainstream. On the other hand, the Cooperatives' propose an approach that has been hand-picked by pole owners, adopted solely to reduce electric rates, never accepted by any other government agency, and never approved by any court. It would, in short, put the Commission on island by itself in the regulatory community.

In summary:

FCC Methodology	TVA Methodology
• Adopted by expert federal agency applying a public interest standard identical to the Section 62-350 standard.	• Adopted by special purpose agency, with no jurisdiction over the parties here, based on the sole regulatory focus of "keeping co-op rates low," without any showing that proposed attachment rates would have any material impact on electric consumer rates.
• Adopted—and continually affirmed—after extensive comment and input by all interested parties.	• Adopted after input from only co-ops. Other interested parties excluded from the process.
• Benefits from an extensive body of interpretive rulings over dozens of years and has been revised over time to reflect technological and other developments.	• Has never been interpreted or refined, and there is no clear administrative process for such interpretative guidance from the TVA.
• Supported by expert analysis and testimony by economist.	• No support by economic testimony.
• Approved by multiple courts, including the U.S. Supreme Court, as an appropriate pricing methodology that does not result in subsidies or constitute a "takings."	• Never approved by a court.
• Applies a cost allocation approach consistent with prior Commission decisions.	• Applies a cost allocation approach inconsistent with prior Commission decisions.
• Specifically approved by North Carolina Business Court in two written decisions—one involving a co-op—after bench trials. The *Rutherford* decision was affirmed on appeal by the Court of Appeals. (The *Landis* decision was not appealed.)	• Never considered by a North Carolina court.

• Would bring rates in line with investor-owned utility poles in North Carolina and help ensure uniform, predictable, and consistent regulatory treatment of this virtually identical resource.	• Would result in rates that are more than 100% above existing co-ops rate and some 4 to 5 times more than investor-owned utility pole rates.
• Best mimics a competitive market by bringing prices closer to the cost of the unit of service being provided.	• Disrupts the competitive market by causing attachers to subsidize co-op infrastructure.
• Widespread adoption by overwhelming majority of states that regulate pole attachments.	• Never adopted by a state or any state or federal regulatory agency.

* * *

CONCLUSION

For these reasons, NCCTA respectfully requests that the Commission adopt the FCC rate methodology in light of the record in this proceeding conclusively demonstrating that use of this methodology will produce just and reasonable pole attachment rates.

Respectfully submitted, this the 12th day of September, 2017.

NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION

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CERTIFICATE OF SERVICE

I certify that a copy of NCCTA's Proposed Post-Hearing Brief as *Amicus Curiae* has been served by electronic mail on counsel of record in this proceeding.

This 12th day of September, 2017.

/s/ Eric M. David
Eric M. David
Attorney for NCCTA

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EXHIBIT A

RESPONSES TO QUESTIONS DESIGNATED FOR POST-HEARING BRIEFING

At the conclusion of the hearing, the Chairman propounded a number of questions for the parties to consider in briefing. *See* e-mail from Lemuel Hinton dated June 27, 2017 (filed in each docket). These questions relate to the application of "value of service" and "externality" principles to the issues in dispute, particularly with regard to the status (profit vs. non-profit) of the utility and/or attaching party and the potential impact on broadband deployment.

The Commission's task under Section 62-350 is to resolve disputes "consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions." However, the statute also makes clear that the Commission's role is confined to a quasi-adjudicatory role, that by "setting rates" to resolve disputes it is not granted "general rate-making authority," and that its authority is not expanded beyond that the dispute resolution authority granted by the statute. G.S. § 62-350(c). Given this, the broad "public interest" authority specified by the statute does permit the Commission to consider broader issues akin to the consideration of "externalities" and "value of service" in traditional ratemaking proceedings. But these considerations do not apply in the same way as they might in a ratemaking case and they do not override the basic task in front of the Commission—which is to resolve disputes so as to derive just and reasonable rates, terms and conditions.

In any case, consideration of these public interest factors only enhances the position of TWC in these proceedings, as the FCC rate methodology will best balance the interests (private and public) at play here in the best interests of the public as a whole, as opposed to the proposal of the Cooperatives, which serves to advance their private interests to the detriment of the public interests.

(1) Profit status of the parties

The profit status of the parties (for-profit versus not-for-profit) of the parties is only marginally relevant to the statutory inquiry before the Commission (*i.e.*, only to the extent it bears on attachment costs).

As regards the Cooperatives' status as non-profit entities, the Cooperatives' expert witnesses make much of the EMCs' non-profit status, but they fail to articulate any principled basis grounded in cost analysis for granting them special benefits by virtue of this status.[44] The co-ops, of course, do serve an important public role in ensuring adequate

[44] In his testimony, Mr. Arnett makes repeated reference to the parties "profit" status in his testimony, his basic point being that non-profit companies should not "subsidize" the provision of service by for-profit entities. *See* Arnett Direct Testimony, at 31. Setting aside the self-evident nature of his concern (no party is advocating such subsidies), and setting aside his complete failure

electric service in rural areas that are not served by the investor-owned utilities. However, Section 62-350 does not charge the Commission with granting special benefits to the co-ops in support of their core service. To the contrary, to do so would only disrupt the establishment of a competitive market for communications services by pricing inputs based on non-cost-based factors. To the limited extent that the cooperatives' nonprofit status is relevant, it would result in lower attachment rates, given that they benefit from lower costs of operation, lower capital costs, and are not organized to generate profit for investors.

As regards TWC's status as a for-profit entity and/or the potential status of a third party attacher (such as the TMCs) as a non-profit entity, no party has proposed a methodology that includes profit status as the attaching party as a relevant factor in setting rates; no witnesses have offered evidence concerning proposed adjustments to rates based on the attaching party's profit status; there is no non-profit entity before the Commission in these proceedings seeking to establish attachment rates; and there is no evidence in the record relating to the costs of attachment for non-profit entities and how, if at all, those cost might differ from costs incurred by for-profit companies in attaching. Given this, there is no basis in the record for making such a differentiation in attachment rates.

Moreover, setting a rate based on the profit status of the attaching entity would violate the basic statutory prohibition against discriminatory rates.[45] While in ratemaking cases the Commission has authorized differentiated rates based on material differences in the nature of the service provided, here the service is functionality, technically, and practically identical and will be used to provide substitutable services. *See, e.g., State ex rel. Utils. Comm'n v. Mead Corp.*, 238 N.C. 451, 78 S.E.2d 290 (1953) ("There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service."). Making these sort of distinctions would also lead to anticompetitive results, as TWC competes with TMCs in many areas; these are precisely the sort of arbitrary pricing distortions that should be weeded out from wholesale pricing to facilitate a competitive market. While the Commission is authorized to make distinctions among rate classes in the exercise of its ratemaking authority based on a wide range of factors such as quantity used, time of use, or manner of service, (1) the Commission's ratemaking authority is not implicated here, and (2) there are no "classes" of customers to distinguish.

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to provide evidence of such subsidies, Mr. Arnett offers no specific proposal to adjust rates in an upward or downward fashion to account for the parties' respective profit status.

[45] *See* G.S. § 62-350 (requiring cities and co-ops to offer access to poles, ducts, and conduits at just, reasonable, and *nondiscriminatory* rates, terms, and conditions) (emphasis supplied); G.S. § 62-140 ("No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage."); G.S. § 117-16.1 ("No electric membership corporation shall, as to rates or services, make or grant any unreasonable preference or advantage to any member or subject any member to any unreasonable prejudice or disadvantage. No electric membership corporation shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. ..."). This latter provision only applies to "members," but cable companies are members of the respect co-ops as they are power customers in addition to being attachment customers.

Here, there is no evidence in the record to suggest that for-profit entities get any different service or benefits in connection with attachment than non-for-profit attachers and, accordingly, any differentiation in rates based on the profit-status of the attaching party would be impermissible. In other contexts, the Commission has found that profit versus non-profit status is immaterial to the application of Chapter 62. *See* Order Issuing Declaratory Ruling, SP-100, Sub 31 (April 15, 2016) ("The fact that NC WARN's 'test case' involves a non-profit seller and a non-profit buyer of electric power does not justify a determination that the sale is not to or for the public.").

(2) Value of the attachment to the attaching party

"Value of service" ratemaking generally seeks to derive rates that reflect the value of the commodity or service provided to the customer. *See* William A. Mogel, *Regulation of the Gas Industry*, § 40.05 (LexisNexis Matthew Bender 2016). North Carolina courts have recognized that the Commission may consider "value of service" principles in connection with the exercise of its ratemaking authority. *See, e.g., Utils. Comm'n v. City of Durham*, 282 N.C. 308 (1972) (reciting that "value of the service to each customer class" is one of the factors that may be considered in setting rate classes). "Value of service" is just one of many factors that the Commission is permitted to consider in adopting a rate design, including factors such as type of service, quantity of use, time of use, manner of service, competitive conditions relating to acquisition of new customers, historical rate design, revenue stability to the utility, and economic and political factors.[46] The application of these factors ensures that distinctions between rate classes are appropriate, justified and non-discriminatory.

In other words, the Commission has looked at value of service as a factor in rate design under its traditional ratemaking authority as one of series of factors necessary to ensure that distinctions between rate classes are appropriate and meaningful and, in some respect, are appropriate to the nature and level of service provided to the customer. Here, there are no such separate class of ratepayers—there are no lines to be drawn that would necessitate consideration of factors such as "value of service". In any event, the Commission has never applied this consideration to drive up the rates to be paid by ratepayer on the grounds that the service is "really important" to the consumer; to the contrary, it has been often applied as a downward constraint on rates recognizing that consumers may have substitute service available in some situations.[47]

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[46] *See, e.g., Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14 (1981); *Utils. Comm'n v. N.C. Textile Manufacturers Ass'n*, 313 N.C. 215 (1985). *See also* Order Granting Partial Rate Increase, Docket No. G-5, Sub 386, 189 P.U.R. 4th 251 (Oct. 10, 1998), at 54 (citing list of factors that may be considered).

[47] *See, e.g.*, Order Granting Partial Rate Increase, Docket No. G-5, Sub 386 ("value of service recognizes that the price paid for natural gas service cannot be significantly greater than the price of a satisfactory alternative fuel as well as the fact that gas is cleaner burning and easier to use."), at 51.

Cost of service has never been applied by the Commission outside the context of drawing distinctions between classes of ratepayers, and it has never been applied in the context of setting rates for a necessary input to the provision of a competitive service. Indeed, the concept has no direct application here, where the task before the Commission does not involve the exercise of the Commission's traditional rate-setting authority but rather requires the determination of the appropriate rate that is, in essence, a wholesale input into a competitive service. Pricing of monopoly inputs into a competitive market have never been established in this fashion. The entire reason that regulation is needed in this area is that the right sought (attachment) is extremely important to the party seeking the right and the service cannot be obtained elsewhere (there is no competitive market for attachments). It would defeat the purpose of the regulation if the right was then "valued" in such a manner as to make its exercise impracticable and futile. (Taken to the extreme, value of service pricing applied here would result in nothing better than unregulated monopoly rates.) For this reason, no witnesses have proposed rate adjustments tied to this factor and there is no evidence in these proceedings describing how "value" of attachment might be fairly and accurately measured and quantified. Clearly, the determination of "value" to the attaching party is a highly speculative inquiry that has no place in this pricing analysis.

(3) Societal interest in broadband expansion

As discussed, the Commission may and should consider the impact of a particular methodology on broadband deployment as party of its "public interest" considerations. Establishment of a methodology which is conducive to broadband deployment is, without question, in the public interest. However, by this consideration, no party is asking that the Commission "subsidize" the deployment of broadband; rather the issue is whether the methodology helps to foster or deter the provision of necessary services. Indeed, adoption of a methodology which will thwart the provision of these services would be invalid under Section 62-350.

* * *

EXHIBIT B

LIST OF ELECTRIC MEMBERSHIP CORPORATIONS

North Carolina Electric Cooperatives

Albemarle Electric Membership Corporation
Counties Served: Chowan, Perquimans, Pasquotank, Camden, Currituck

Blue Ridge Energy
Counties Served: Ashe, Alleghany, Wilkes, Watauga, Caldwell, Alexander, Avery

Brunswick Electric Membership Corporation
Counties Served: Columbus, Brunswick, Bladen, Robeson

Cape Hatteras Electric Cooperative
County Served: Dare

Carteret-Craven Electric Cooperative
Counties Served: Carteret, Craven, Jones, Onslow

Central Electric Membership Corporation
Counties Served: Chatham, Harnett, Lee, Moore, Randolph

Edgecombe-Martin County Electric Membership Corporation
Counties Served: Nash, Edgecombe, Martin, Pitt, Beaufort, Bertie, Halifax, Wilson

EnergyUnited
Counties Served: Alexander, Cabarrus, Caldwell, Catawba, Davidson, Davie, Forsyth, Gaston, Guilford, Iredell, Lincoln, Mecklenburg, Montgomery, Randolph, Rockingham, Rowan, Stokes, Yadkin, Wilkes

Four County Electric Membership Corporation
Counties Served: Duplin, Sampson, Bladen, Pender, Columbus, Onslow

French Broad Electric Membership Corporation
Counties Served: Madison, Buncombe, Yancey, Mitchell, NC; Unicoi, Cocke, Tenn.

Halifax Electric Membership Corporation
Counties Served: Warren, Halifax, Martin, Nash

Haywood Electric Membership Corporation
Counties Served: Haywood, Buncombe, Transylvania, Jackson, Madison, Macon, NC; Oconee, SC; and Rabun, GA

Jones-Onslow Electric Membership Corporation
Counties Served: Lenoir, Jones, Onslow, Duplin, Pender, Craven

Lumbee River Electric Membership Corporation
Counties Served: Hoke, Cumberland, Robeson, Scotland

Pee Dee Electric Membership Corporation
Counties Served: Anson, Richmond, Montgomery, Scotland, Moore, Stanly, Union

Piedmont Electric Membership Corporation
Counties Served: Alamance, Caswell, Durham, Granville, Orange, Person

Pitt & Greene Electric Membership Corporation
Counties Served: Pitt, Greene, Lenoir, Wayne, Wilson, Edgecombe

Randolph Electric Membership Corporation
Counties Served: Randolph, Alamance, Chatham, Montgomery, Moore

Roanoke Electric Cooperative
Counties Served: Hertford, Bertie, Gates, Northampton, Halifax, Chowan, Perquimans

Rutherford Electric Membership Corporation
Counties Served: Rutherford, McDowell, Polk, Cleveland, Burke, Caldwell, Catawba, Lincoln, Gaston, Mitchell

South River Electric Membership Corporation
Counties Served: Harnett, Cumberland, Sampson, Bladen, Johnston

Surry-Yadkin Electric Membership Corporation
Counties Served: Wilkes, Surry, Yadkin, Stokes, Forsyth

Tideland Electric Membership Corporation
Counties Served: Beaufort, Craven, Dare, Hyde, Pamlico, Washington

Tri-County Electric Membership Corporation
Counties Served: Wayne, Duplin, Lenoir, Johnston, Jones, Sampson, Wilson

Union Power Cooperative
Counties Served: Mecklenburg, Union, Cabarrus, Rowan, Stanly

Wake Electric Membership Corporation
Counties Served: Granville, Vance, Durham, Wake, Johnston, Nash, Franklin

Source: http://www.ncemcs.com/co-ops/coopList.htm

EXHIBIT C

LIST OF ELECTRICITIES MEMBERS

Abbeville, SC
Albemarle, Stanley County
Apex, Wake County
Ayden, Pitt County
Bamberg (Bamberg County, SC)
Bedford (Bedford County, VA)
Belhaven (Beaufort County)
Bennettsville (SC)
Benson (Johnston County)
Bostic (Rutherford County)
Camden (SC)
Cherryville (Gaston County)
Clayton (Johnston County)
Clinton (Laurens County, SC)
Concord (Cabarrus County)
Cornelius (Mecklenburg County)
Dallas (Gaston County)
Danville (VA)
Drexel (Burke County)
Easley Combined Utilities (Pickens County, SC)
East Carolina University
Edenton (Chowan County)
Elizabeth City (Pasquotank/Camden Counties)
Elizabeth City State University (Pasquotank/Camden Counties)
Enfield (Halifax County)
Farmville (Pitt County)
Fayetteville (Cumberland County)
Forest City (Rutherford County)
Fountain (Pitt County)
Fremont (Wayne County)
Front Royal, VA
Gaffney (SC)
Gastonia (Gaston County)
Granite Falls (Caldwell County)
Greenville (Pitt County)
Greer (Greenville County, SC)

Hamilton (Martin County)
Hertford (Perquimans County)
High Point (Guilford/Davidson/Randolph Counties)
Hobgood (Halifax County)
Hookerton (Greene County)
Huntersville (Mecklenburg County)
Kings Mountain (Cleveland/Gaston County)
Kinston (Lenoir County)
La Grange (Lenoir County)
Landis (Rowan County)
Laurens (Laurens County, SC)
Laurinburg (Scotland County)
Lexington (Davidson County)
Lincolnton (Lincoln County)
Louisburg (Franklin County)
Lumberton (Robeson County)
Macclesfield (Edgecombe County)
Maiden (Catawba/Lincoln Counties)
Martinsville (Henry County, VA)
Monroe (Union County)
Morganton (Burke County)
Murphy (Cherokee County)
New Bern (Craven County)
New River Light & Power Company
Newberry (Newberry County, SC)
Newton (Catawba County)
North Carolina State University
Pikeville (Wayne County)
Pinetops (Edgecombe County)
Pineville (Mecklenburg County)
Red Springs (Robeson County)
Robersonville (Martin County)
Rock Hill (SC)
Rocky Mount (Nash/Edgecombe Co.)
Scotland Neck (Halifax County)
Selma (Johnston County)
Sharpsburg
Shelby (Cleveland County)
Smithfield (Johnston County)
Southport (Brunswick County)
Stantonsburg (Wilson County)
Statesville (Iredell County)
Tarboro (Edgecombe County)

UNC-Chapel Hill (Orange County)
UNC - Greensboro (Guilford County)
Union (Union County, SC)
Wake Forest (Wake County)
Waynesville (Haywood County)
Walstonburg (Greene County)
Washington (Beaufort County)
Western Carolina University
Westminster (Oconee County, SC)
Wilson (Wilson County)
Windsor (Bertie County)
Winterville (Pitt County)
Highlands

Source:

https://www.electricities.com/default/aboutus/ElectriCitiesMembership/MembershipList.aspx (last viewed Sept. 6, 2017).

EXHIBIT D

AFFIDAVIT OF TONI STRAPP

(Legislative History Materials)

[ATTACHED]

AFFIDAVIT OF TONI WAITS STRAPP

I, Toni Waits Strapp, being duly sworn, do hereby state as follows:

1. My name is Toni Waits Strapp. I am a North Carolina State Bar Certified Paralegal. I am employed by the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP.

2. I have reviewed a recording of the proceedings of the North Carolina House of Representatives from June 22, 2015, and I have transcribed the portion of the proceedings concerning Senate Bill 88. Attached is the transcript of the Senate Bill 88 discussion. I hereby certify that the attached transcript is a true and accurate transcription of the Senate Bill 88 discussion. A recording of the House proceedings is also publicly available on the North Carolina General Assembly's website at the following link: http://www.ncleg.net/DocumentSites/HouseDocuments/2015-2016%20Session/Audio%20Archives/2015/06-22-2015.mp3.

3. I have also reviewed a recording of the proceedings of the North Carolina Senate from April 29, 2015, and I have transcribed the portion of the proceedings concerning Senate Bill 88. Attached is the transcript of the Senate Bill 88 discussion. I hereby certify that the attached transcript is a true and accurate transcription of the Senate Bill 88 discussion. Senate recordings are not available on the General Assembly's website, but the April 29, 2015 recording is available from my office on request.

This the 12th day of September, 2017.

Toni Waits Strapp
Toni Waits Strapp

Sworn to and subscribed before me,
this the 12th day of September, 2017.

Notary Public

Carol A. Heynen
Printed Name

My Commission Expires: 2/14/21

OFFICIAL SEAL

Carol A. Heynen
Notary Public
Franklin County, NC
My Commission Expires February 14, 2021

Transcript of North Carolina House of Representatives
Floor Debate Concerning Senate Bill 88

June 22, 2015

(beginning at 12:04 of recording)

Speaker:

Senate Bill 88, the Clerk will read.

Clerk:

Senator Brown, Senate Bill 88, A bill to be entitled, "An act to assign pole attachment disputes to the North Carolina Utilities Commission," General Assembly of North Carolina enacts.

Speaker:

For what purpose does the gentleman from Wake, Rep. Stam rise?

Rep. Stam:

To explain the bill.

Speaker:

The gentleman has the floor to debate the bill.

Rep. Stam:

Mr. Speaker, Members of the House: The bill does a couple of things – what I consider the most important is to move – (interruption) –

Speaker:

Just a moment. The House will come to order. The Gentleman has the floor.

Rep. Stam:

Thank you. Mr. Speaker, members of the House. The bill does several things. What I consider the most important is to move disputes about pole attachment – that is, how much a person who owns a pole gets to charge the person who wants to attach to the pole from the Business Court to the Utility Commission. I've always thought it was unconstitutional, but whether it is or not, extremely unwise, to have a court do something like set rates. That's just not something they teach in law school that courts really can do.

But we have a commission that does that called the Utility Commission. So this transfers those cases, effective immediately, to the Utility Commission. This has been fully vetted with the Public Staff of the Utility Commission and with the Utility Commission itself. There's a provision for fees that the Commission can charge, and then it sets different criteria for how those rates may be determined by the Commission. Basically, saying they can consider any evidence that the Commission believes to be relevant and material, makes sure that there is no bundling of bills with electric service – and that's what it does: allows any evidence to be submitted to the Commission.

And with that, Mr. Speaker, I would be glad to answer a question from anybody – and especially from Rep. Fisher.

Speaker:

For what purpose does the gentleman from Union, Representative Brody, rise?

Rep. Brody:

To ask Representative Stam a question, please.

Speaker:

Does the gentleman from Wake yield to the gentleman from Union?

Rep. Stam:

I do.

Speaker:

He yields.

Rep. Brody:

Rep. Stam, if a utility doesn't want anything on their poles, will the … or does the Utility Commission require them to put something on their poles?

Rep. Stam:

I've been asked hundreds of questions about this bill, Rep. Brody, and that's not one I've been asked, because I can't imagine somebody with an asset to sell just wanting it to be wasted, so I'll have to look at the bill. (pause) Federal law requires it, Rep. Brody, so the answer is "yes."

Speaker:

For what purpose does the gentleman from Mecklenburg, Rep. Bishop, rise?

Rep. Bishop:

To ask Representative Stam a question?

Speaker:

Does the gentleman from Wake yield to the gentleman from Mecklenburg?

Rep. Stam.

I yield.

Speaker:

He yields.

Rep. Bishop:

Does this bill impact the authority of the Utilities Commission to use what is generally described as the FCC Formula approach to setting pole attachment rates if it wishes to do so?

Rep. Stam:

Rep. Bishop, the answer is "no." If the Commission found such evidence to be relevant, it could be introduced and that approach could be used. The bill gives no preference to that method or any other method that the Commission deems relevant and would produce a just and reasonable result.

Speaker:

For what purpose does the gentleman from Cumberland, Representative Floyd, rise?

Rep. Floyd:

To see if Rep. Stam will yield for a question.

Speaker:

Does the gentleman from Wake yield to the gentleman from Cumberland?

Rep. Stam:

I yield.

Speaker:

He yields.

Rep. Floyd:

Rep. Stam, you've mentioned the Utilities Commission and staff – you didn't mention the utility … (pause) the…the… just lost the word …the…the… it's like Southeastern River … coop, coops, I'm sorry.

Rep. Stam:

Oh yes. Oh yes, the coops are fully in support of this bill. As far as I know, every competing group – and there were a dozen of 'em – have agreed on the text of this bill.

Rep. Floyd:

Thank you, sir.

Speaker:

For what purpose does the gentleman from Cumberland, Rep. Lucas, rise?

Rep. Lucas:

To speak briefly on the bill.

Speaker:

The gentleman has the floor to debate the bill.

Rep. Lucas:

This bill has been massaged quite a bit and the coops initially were reluctant about the bill but after having negotiated quite a while, they are on board, as far as I know. Most of the stakeholders are on board, and we need to support the bill.

Speaker:

Further discussion – further debate? If not, the question before the House is the passage of Senate Bill 88 on its second reading. Those in favor will vote aye; those opposed will vote no. The Clerk will open the vote.

(pause)

The Clerk will lock the machine and record the vote.

113 having voted in the affirmative and none in the negative, Senate Bill 88 passes its second reading and will, without objection, be read a third time.

Clerk:

General Assembly of North Carolina enacts.

Speaker:

Further discussion or further debate? If not, the question before the House is the passage of Senate Bill 88 on its third reading. Those in favor will say aye; those opposed no. (voice vote) The ayes have it. Senate Bill 88 passes its third reading and will be returned to the Senate.

Transcript of North Carolina Senate
Floor Debate Concerning Senate Bill 88

April 29, 2015

President Pro Temp.:

Moving on to a second reading of public bills, non-rollcall. Senate Bill 88 – the clerk will read.

Senate Bill 88 pole attachment disputes.

Senator Brown is recognized.

Sen. Brown:

Mr. President, what the bill does is it moves the adjudication of pole attachment disputes from the Business Court to the North Carolina Utilities Commission and it makes it clear that the Commission may consider any evidence or rate making methodology offered by the parties in those disputes. I ask for your support.

President Pro Temp.:

Do we have any discussion or debate?

President Pro Temp.:

Senator Bryant, for what purpose do you rise?

Senator Bryant:

To ask the bill's sponsor a question.

President Pro Temp.:

Senator Brown, do you yield for a question?

Senator Brown:

I do.

Senator Bryant:

Senator Brown, like many people in here we have both electric co-ops and electric companies and phone companies and co-ops in our districts and we are committed to each of them, but I know on the phone company side they were concerned as to whether it was your intent that when the Utilities Commission would hear these disputes – that you say in the bill that all evidence can be considered and so, does that include the FCC formula that was a part of sort of – one of the original disputed items? Is that one of the issues that the Utilities Commission can consider?

Senator Brown:

Yes, it is.

Senator Bryant:

And that's your intent?

Senator Brown:

Yes.

Senator Bryant:

Thank you.

President Pro Temp.:

Any further discussion or debate? Hearing none, the President for the Senate as it passes the committee substitute to Senate Bill 88 on its second reading. All in favor vote aye, opposed vote no. Five seconds will be allowed for the voting. The clerk will record the vote.

46 having voted in the affirmative and 4 in the negative, committee substitute Senate Bill 88 passes its second reading without objection, to be read a third time.

North Carolina General Assembly.

Senator Brock, for what purpose do you rise?

Senator Brock:

I change my vote on second reading from aye to no.

President Pro Temp.:

Senator Brock changes his vote on the second reading from aye to no. The final count is 45 to 5. 45 to 5.

Do we have any further discussion or debate? Hearing none, the President for the Senate as it passes the committee substitute to Senate Bill 88 on its third reading. All in favor will say aye; opposed no. The ayes have it and committee substitute Senate Bill 88 passes its third reading and will be sent to the House.

EXHIBIT E

DECLARATION OF DAVID DANIEL MURPHY CABLE, ANDREWS CABLE, AND CHEROKEE CABLE

[ATTACHED]

DECLARATION OF DAVID DANIEL

I, David Daniel, pursuant to the provisions of 28 U.S.C. 1746, do hereby state and declare as follows:

1) My name is David Daniel. I am the owner and operator of CND Acquisition Corp. which operates cable systems in Murphy, Andrews and Cherokee County, North Carolina, under the names Murphy Cable, Andrews Cable, and Cherokee Cable.

2) My company is a member of the N.C. Cable Telecommunications Association.

3) CND Acquisition is a very small company operating in rural, mountainous areas of Western North Carolina.

4) We provide broadband, video and digital telephone service to our subscribers.

5) It is critical to my business that I have access to utility pole attachments at reasonable rates. Because I have a small base over which to spread my costs, a relatively small increase in costs can have a direct impact on customer costs—-and my ability to stay in business.

6) I have around 1,200 attachments with Blue Ridge Mountain EMC and around 1,700 attachments with Murphy Power Board, the municipal power company in the Town of Murphy. Currently I pay approximately $3.00 per pole to Murphy and about $12.00 to Blue Ridge Mountain EMC. Both these entities distribute TVA power and I understand they intend to substantially increase these rates—although, to date, they have not done so. I also understand that application of the TVA methodology could result in my pole rate doubling or tripling.

7) This potential increase is further complicated by the fact that Blue Ridge Mountain EMC is actively competing with my company in the provision of broadband services. So not only am I forced to pay rates to my competitor as a necessary input to my business, I have little (or no) ability to control what rates they charge me. The simple fact is that I can’t negotiate a fair rate with someone like a city

or a co-op who has a monopoly on what I must have to be in business and who has no rules governing what rates they charge.

8) The rates my company pays for pole attachments has a direct impact on my company's ability to offer services to my customers. I will not be able to expand my services, or invest in my infrastructure to provide greater broadband speeds, if my pole rates are increased as suggested they might. As one of the only wireline broadband options in my service area, customers need access to my company's services, and I'm eager to expand services whenever possible. However, operating in rural areas with fewer customers and more attachments, my business simply cannot absorb significant increases in operating expenses, including pole attachment rates. And my customers can little afford increases in the prices I charge.

9) I am over the age of 18, competent to give this Declaration, and have knowledge of the facts set forth herein.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

This the 11th day of September, 2017.

David P. Daniel

David Daniel

EXHIBIT F

AFFIDAVIT OF BRYAN HYDER
COUNTRY CABLEVISION AND
CAROLINA MOUNTAIN CABLEVISION

[ATTACHED]

AFFIDAVIT OF BRYAN HYDER

I, Bryan Hyder, being duly sworn, do hereby state as follows:

1. My name is Bryan Hyder. I am Secretary/Treasurer of Country Cablevision, Inc. ("CC") and Carolina Mountain Cablevision, Inc. ("CMC"). My office is in Burnsville, North Carolina.

2. CC and CMC are providers of cable telecommunications services, including video, broadband, and digital phone services in Western North Carolina.

3. Country Cablevision, Inc. provides service in Mitchell, Madison, McDowell, and Yancey Counties, including the incorporated communities of Bakersville (357 households), Burnsville (1500 households), and Spruce Pine (1492 households). We offer broadband service in these areas at 25 Mpbs, 50 Mbps, and 100 Mpbs tiers, and also offer symmetrical speeds up 1 Gig where we have fiber-to-the-home facilities.

4. Carolina Mountain Cablevision, Inc. provides service in unincorporated areas Haywood County, including the unincorporated communities of Jonathan Valley, Bethel, Cruso, Iron Duff and Crabtree. CMC offers broadband service at 30 Mbps, 60 Mbps and 100 Mbps tiers.

5. Our companies are members of the North Carolina Cable Telecommunications Association.

6. CC and CMC currently provide service in several rural areas of the state with very low population density. For example, some of our older plant serves density in the range of 12-13 homes per mile and with fiber we serve some extremely rural communities, down to 6 homes per mile or less.

7. We activity seek to serve new communities, regardless of density, where we believe a business case exists for proving service. In analyzing the business case for extension of service we look to both the prospective revenue generated from a new customer and the cost of extending service to the customer. A significant component of this cost—especially in rural areas—can be the cost of attaching to third party utility poles. Not only do the rates charged by the rural utilities often exceed the rates charged by investor-owned-utilities in urban areas, there are more attachments per customer than in urban areas. Installing our own utility poles would be, without question, cost prohibitive—and certainly it does not serve the public interest to put up a duplicative set of poles in the right-of-way.

8. CC recently was able to deploy fiber-to-the-home service in Mitchell and Yancey Counties, including small communities such as Harrell Hill, Poplar Creek, Cane Creek, Red Hill, Buladean, and Fork Mountain in Mitchell County, and Ramseytown, Flat Top, Double Island, and Pensacola in Yancey County. The fiber-to-the-home technology allows us to deploy extremely high speeds of service in some of the most rural areas of the state. Fortunately, we received a federal grant which helped to defray the costs of building in these high cost areas—however, even with the grant,

we likely would not have been able to deploy the service if our ongoing operational costs had been increased by high pole attachment rates. In connection with our federal application, we carefully evaluated the possibility of extending FTTH service to unincorporated Haywood County but could not, even with government funding, build a business case for doing so given the high make-ready and pole attachment rates assessed by the local co-op there.

9. In Haywood County, the local electric co-op is seeking to charge $14.95 per pole attachment for use of its utility poles—an amount which increases by about $0.15 every year and which, we believe, greatly exceeds the co-op's actual costs of providing the service. The ratio of poles to customers in this area is about 5 to 1, meaning that there are many more poles than customers. If you multiply the total number of poles in the service area by the pole attachment rate and then divide by the number of customers, CMC pays nearly $6 per month per customer just for pole attachments. When $6 of our monthly per-customer revenue is taken off the top just for pole attachments, it is extremely difficult to build a business case that would allow us to extend service in these areas.

10. For example, CMC was asked to extend service to the Fines Creek area of Haywood County. As the incumbent cable company in this area, we are one of the very few entities that could realistically provide robust, wireline broadband service to this area. But for the high pole attachment rates that the local co-op seeks to charge, we would consider extending our service to this area. The high pole rates, however, make service to this area impossible.

11. I understand that some co-ops are proposing that attachment rates be increased to $30/pole, or more. Certainly, CC and CMC would not be able to extend service to new customers at these rates and even our ability to continue service to our existing customers would be severely challenged.

This the 6th day of September, 2017.

Bryan Hyder

Bryan Hyder

Sworn to and subscribed before me,
this the 6th day of September, 2017.

Sherry L Fender

Notary Public

Sherry L Fender

Printed Name

My Commission Expires: 3-31-22

OFFICIAL SEAL

EXHIBIT G

DECLARATION OF FRANK STYERS
RED'S CABLE

[ATTACHED]

DECLARATION OF FRANK STYERS

I, Frank Styers, pursuant to the provisions of 28 U.S.C. 1746, do hereby state and declare as follows:

- My name is Frank Styers. I live in Washington, NC. I am the owner and operator of Red's Cable, which provides cable and broadband services in the communities of Bath and Bayview, NC.

- My company is a long-time member of the N.C. Cable Telecommunications Association. I am a current member of the NCCTA Board of Directors and Past-President of the Association.

- Red's is a very small company, with only one employee, myself.

- Bath, located in Beaufort County, has 176 homes (total population of 249 persons) according to the 2010 census. Bayview is an unincorporated community in Beaufort County, which has 305 homes according to the 2010 census.

- We offer a broadband cable service with a basic analog cable service and with a digital cable service of over 300 TV digital channels with a large number of them in HD. We also offer an audio service and we offer broadband internet service with speeds as high as 10 mps down and 2 mps up for all our customers.

- It is critical to my business that I have access to utility pole attachments at reasonable rates. Because I have a small base over which to spread my costs, a relatively small increase in costs can have a direct impact on customer costs--and my ability to stay in business.

- If my pole rates went up to $20.00/pole like some co-ops and cities are seeking to charge, my cost to customers <u>for just pole attachments</u> would go from $1.44/month to $4.82/month. My customers and my business cannot absorb these type of increases.

- The simple fact is that I can't negotiate a fair rate with someone like a city or a co-op who has a monopoly on what I must have to be in business and

who has no rules governing what rates they charge.

- I am over the age of 18, competent to give this Declaration, and have knowledge of the facts set forth herein.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

This the 6th day of August, 2017.

Frank Styers