STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-23, SUB 50

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION, **Petitioner,** **v.** **CHARTER COMMUNICATIONS PROPERTIES LLC,** **Respondent.**	**PETITIONER BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION'S POST-HEARING BRIEF**

Petitioner, Blue Ridge Electric Membership Corporation ("Blue Ridge"), submits this Post-Hearing Brief, in support of its petition pursuant to N.C.G.S. § 62-350 ("Section 62-350") to resolve disputes over the just and reasonable rates, terms and conditions for Respondent, Charter Communications Properties, LLC 's ("Charter") attachments to Blue Ridge's poles.

INTRODUCTION

The rates, terms, and conditions Blue Ridge has proposed to govern Charter's attachments to Blue Ridge's utility poles are just and reasonable, and accordingly satisfy the requirements of Section 62-350.

Despite Charter's insistence to the contrary, resolution of this case requires the Commission to decide it based on the facts and record presented, and not on a rote

application of Charter's "FCC Cable Rate" based on artificial presumptions, rather than actual data, or the Commission's prior decisions in cases involving disputes between Charter's corporate affiliate, Time Warner Cable Southeast, LLC and four cooperatives earlier this year. [1]

The General Assembly, in transferring jurisdiction over pole attachment cases to the Commission has directed that it must "consider any evidence or rate-making methodologies offered or proposed by the parties" in order to determine just and reasonable pole attachment rates, terms and conditions on a "case-by-case basis" in a manner "consistent with the public interest and necessity." N.C.G.S. § 62-350. Adherence to that directive requires the Commission to consider the manner in which its outcome here must differ from its decisions in *Time Warner*.

First, in contrast to the proceedings in *Time Warner*, where the parties' pole attachment agreements had expired, Charter has ***stipulated*** that it continues to attach its facilities to Blue Ridge's poles, pursuant to its 2008 Pole Attachment Agreement dated September 1, 2008 (the "2008 Agreement"), and thus Blue Ridge and Charter are subject to an existing contract. As a result, Section 62-350 does not give Charter a right to "true up" payments retroactively applying the Commission sets, and Charter's counterclaim must be denied.

Second, the Commission should set a pole attachment rate and terms and conditions based on the individualized evidence in this case and Blue Ridge's actual data.

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

Blue Ridge has presented actual data to rebut the various "presumptions" regarding space allocation and pole costs used in the FCC Cable Rate formula, as well as evidence regarding alternative rate methodologies. The Commission should, accordingly use this data and apply a rate methodology that appropriately reflects the true costs of Charter's use of Blue Ridge's poles and ensures that Blue Ridge's members are not forced to subsidize Charter's operations.

The Commission also should disregard Charter's illusory promises that it will extend broadband if awarded a low pole attachment rate. Charter has chosen to serve only the most densely populated portions of Blue Ridge's territory and has produced no evidence of plans to expand broadband to any customer in Blue Ridge's territory, even if it is granted an artificially low pole attachment rate. Thus, granting Charter a low pole attachment rate will only result in Blue Ridge's members, many of whom have no opportunity to purchase Charter's services, subsidizing Charter's limited operations in small pockets of Blue Ridge's territory.

Finally, rather than propose new terms and conditions to govern Charter's pole attachments, Blue Ridge has merely sought to confirm terms and conditions Charter has accepted twice before, as part of agreements entered in 2003 and 2008, and which have governed the parties' relationship for more than a decade. Indeed, Charter has conceded in the course of these proceedings that it finds several of Blue Ridge's proposed terms reasonable and acceptable.

For each of these reasons, as well as those set forth below, the Commission should confirm Blue Ridge's petition, and set just and reasonable rates, terms and conditions that appropriately compensate Blue Ridge for Charter's use of its poles and

ensure Blue Ridge is able to accomplish it statutory mission of providing safe, reliable, low cost power to its members.

I. CHARTER IS NOT ENTITLED TO "TRUE UP" PAYMENTS.

As a threshold matter, whatever rate the Commission sets for Charter's attachments to Blue Ridge's poles, Charter has no right to "true up" payments, as it has asserted in its counterclaim. ***Unlike the Time Warner cases, Charter has (i) stipulated that it continues to attach to Blue Ridge's poles pursuant to the parties' 2008 Agreement, see Joint Stipulations, ¶ 6, and (ii) continued to pay pole attachment fees to Blue Ridge under that agreement without protest.*** Thus, it is undisputed that Charter and Blue Ridge are parties to an *existing agreement.* Section 62-350, therefore, requires that the Commission apply any new rate only prospectively. Indeed, a close reading of the statute reveals that Charter has no basis to assert a counterclaim for retroactive "true up" payments back to 2015.

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

[2] The parties' negotiations in this case do not meet either of these triggers, which means the 90-day negotiation period never commenced. Blue Ridge first sent a request to negotiate a

Section 62-350(c) governs the date on which any new rate set by the Commission will take effect, as follows:

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

N.C.G.S. § 62-350(c) (emphasis added). Thus, when the parties are acting under an existing pole attachment agreement, the statute requires the Commission to apply any new rate on only a *prospective* basis. *Id.*[3]

Here, there is no dispute the parties have continued to operate under the existing agreement. Charter stipulated in the parties' joint pre-trial submissions that, "***Charter attaches and has attached to Blue Ridge's utility poles pursuant to a Pole Attachment Agreement dated September 1, 2008***." Joint Stipulations, ¶ 6 (emphasis added).[4]

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renewed pole attachment agreement on May 22, 2014, which is more than 120 days from September 1, 2013—the date the 2008 Agreement was set to otherwise expire. *See* Layton Test., Vol. 1, p. 36; *see also* Exhibit LL-3, p. 2. The negotiations were not initiated "following a request from a communications attacher," nor were they initiated "following a request . . . made pursuant to the terms of the agreement or made within 120 prior to or following the end of the term of the agreement." *See* N.C.G.S. § 62-350(b). As a result, even if any new rate were to be applied retroactively (which it should not), it would apply only back to the commencement of this action, not the parties' negotiations. *See* N.C.G.S. § 62-350(c).

[3] Though Charter did not assert such a claim in its pleadings, Ms. Kravtin provided calculations in her pre-filed testimony asserting that Charter is entitled to $81,854 in "overcharges" because it was billed on a per-attachment, rather than a per-pole basis as provided in the 2008 Agreement. To the extent Charter is asserting a counterclaim based on this difference, it is not properly before the Commission. Section 62-350 requires that "the parties shall identify with specificity in their respective filings the issues in dispute." N.C.G.S. § 62-350. Charter, however, did not identify any claim for alleged overcharges based on per-attachment, rather than per-pole, billing in its counterclaim. Moreover, to the extent Charter does so, it is necessarily conceding that the 2008 Agreement continues to govern the parties' relationship. *See* note 6, *supra*.

[4] Charter is bound by this stipulation. "In North Carolina, 'stipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the

Charter also affirmatively alleged in its Answer and Counterclaims that it has attached, and continues to attach, its facilities to Blue Ridge's poles "pursuant to" the parties' existing agreement. *See* Counterclaim, ¶ 26 ("Prior to and after the enactment of Section 62-350, Charter has attached its facilities to BREMC's poles pursuant to a pole attachment agreement executed by BREMC and Charter in 2003.")[5]

Charter's witnesses also uniformly testified that it has continued to operate under the terms of its 2008 Agreement with Blue Ridge even after the agreement's original term ended. Mr. Mullins stated at the outset of his prepared testimony that "Charter makes its attachments under a pole attachment entered into in 2008 and attached as [MM Exhibit 1]." *See* Mullins Test., Vol. 3, p. 223. He then repeatedly acknowledged that the terms of the 2008 Agreement—which he calls the "current agreement"—continue to govern Charter's attachments to Blue Ridge's poles. *See* Mullins Test., Vol. 3, p. 225 (referring to "Charter's ***current agreement***, entered into in 2008" (emphasis added)); p. 227 ("Charter makes its attachments to these 'mainline' and 'secondary' poles pursuant to the parties' 2008 agreement"); p. 231 (acknowledging that the 2008 agreement requires Charter to attach its facilities at least 72 inches below Blue Ridge's lowest grounded neutral); p. 232 (testifying that Blue Ridge currently has the right to "recover" space on

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stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact.'" *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013) (quoting *Thomas v. Poole*, 54 N.C.App. 239, 241, 282 S.E.2d 515, 517 (1981)). The Commission follows this same rule. *See* Rule R1-24(c) (providing that stipulations filed with the Commission "shall be binding upon the parties thereto and may be regarded and used by the Commission as evidence at the hearing.")

[5] Charter erroneously listed the 2003 Agreement in its Counterclaims, rather than the 2008 Agreement. This mistake, however, is of no consequence. Charter's witnesses testified that the terms of the 2003 Agreement are substantially similar to those in the 2008 Agreement, *see* Mullins Test., Vol. 3, p. 223, and, as set forth above, Charter has stipulated that the 2008 Agreement governs its attachments to Blue Ridge's poles. *See* Joint Stipulations, ¶ 6.

its pole for its own facilities, and require Charter to relocate its attachments, "under the parties' 2008 agreement"); p. 250 (asserting that Blue Ridge has a remedy if Charter fails to transfer its attachments in a timely fashion, because "[t]he 2008 agreement allows Blue Ridge to make the transfer at Charter's expense").

Despite both stipulating and admitting that the 2008 Agreement remains in force, Charter continues to mistakenly assume Section 62-350 grants it a right to "true up" payments as a matter of course. In her testimony, Ms. Kravtin asserts Charter is entitled to $1.1 million in "true up" payments for 2015 through 2017, which she claims represents the difference between the FCC rate and the rates Charter paid Blue Ridge pursuant to the 2008 Agreement. *See* Kravtin Test., Vol. 4, p. 172-73.[6] However, the only authority she cites for Charter's entitlement to such "true up" payments is her mistaken "understanding" of Section 62-350's provisions.

Charter, having stipulated and repeatedly admitted that it continues to operate under the 2008 Agreement with Blue Ridge, cannot now argue the agreement has expired. The 2008 Agreement initially provided for a three year term, with two, one-year extensions. *See* 2008 Agreement, Exhibit LL-3, p. 2. However, that does not prevent Charter from agreeing to continue under the terms of the 2008 Agreement—just as it has

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[6] Oddly, Ms. Kravtin recites that she "understands" Section 62-350 gives Charter a right to "true up" payments, even though she assumes the 2008 Agreement remains in force. Ms. Kravtin asserts that Charter is entitled to $1,010,251 for the period from 2015 – 2017, based on the difference between Charter's contractual pole attachment rate and her calculation of the FCC rate (using presumptions rather than actual Blue Ridge data). *See* Kravtin Test., Vol. 4, p. 172-73. Yet, she also asserts that Charter should be entitled to an additional "true up" payment of $81,954, based on the terms of the 2008 Agreement, because it provides for billing on a per-pole, versus, per-attachment, basis. *Id.*

Charter cannot have it both ways. It is well established that "a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement." *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854 (1991) (quoting *Advertising Inc. v. Harper*, 7 N.C.App. 501, 505, 172 S.E.2d 793 (1970)).

done here. Unless the statute of frauds applies, parties are free to contract orally, and the terms of that contract may be oral, written, or both. *See Bishop v. Du Bose*, 252 N.C. 158, 163, 113 S.E.2d 309, 314 (1960) ("[P]arties may, at their option, put their agreement in writing or may contract orally, or put some of the terms in writing and arrange others orally.") Moreover, a party who performs under the terms of a written contract, and accepts its benefits, is bound by the agreement's terms, even if the party did not sign the document itself. *See Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822–23, 561 S.E.2d 578, 582 (2002) (finding an enforceable agreement despite the defendants' failure to sign it because the defendants accepted consideration from the plaintiffs and acted pursuant to the terms of the agreement;, noting that "[t]here was never any indication during that process that the parties were not operating [pursuant to the terms of the agreement]"); *W.B. Coppersmith & Sons, Inc. v . Aetna Ins. Co.*, 222 N.C. 14, 21 S.E.2d 838 (1942) ("[A] signature is not always essential to the binding force of an agreement . . . and . . . in the absence of a statute it need not be signed, provided it is accepted and acted on, or is delivered and acted on.").

Here it is undisputed that Charter has continued to attach to Blue Ridge's poles pursuant to the 2008 Agreement and thus agreed to continue its term through continued performance. Not only has Charter stipulated that the agreement remains in place, but it also alleged in its pleadings that it "accepted," and continued to pay, monthly pole attachment fees to Blue Ridge. Counterclaim, ¶ 27. ***Moreover, unlike the Time Warner proceedings,[7] Charter has not ever paid pole attachment fees to Blue Ridge "under***

[7] In the *Time Warner* cases, TWC continued to pay annual pole attachment fees to the cooperatives, but did so "under protest," ostensibly to preserve its right to "true up" payments. *See Time Warner* Order, p. 5.

protest," or subject to any other reservation of rights. *See* Martin Test., Vol. 3, pp. 149-50. Accordingly, independent of its stipulation, Charter's conduct shows it has agreed to continue under the 2008 Agreement by continuing to pay fees to maintain and make new attachments to Blue Ridge's poles.

Charter's stipulation and admissions that the 2008 Agreement remains in place—and that it is thus subject to an existing pole attachment agreement—bar it from seeking "true up" payments under Section 62-350. Accordingly, whatever rate the Commission ultimately sets, that rate must be set only prospectively, and Charter's counterclaim must be denied.

II. THE COMMISSION SHOULD ENGAGE IN A CASE-BY-CASE ANALYSIS TO DEVELOP A JUST AND REASONABLE RATE FOR CHARTER'S ATTACHMENTS TO BLUE RIDGE'S POLES.

Blue Ridge maintains that the TVA Rate is the most appropriate methodology to derive just and reasonable rates for third-party attachments to electric cooperatives' poles and that this Commission should adopt the TVA methodology in deciding cases under Section 62-350. Blue Ridge relies upon its prior filings, including the testimony of its witnesses, demonstrating the appropriateness of the TVA methodology. Without waiving or abandoning its position, Blue Ridge recognizes that the Commission declined to adopt the TVA formula in the *Time Warner* cases, and accordingly, will not further argue the merits of that methodology as part of this post-hearing brief.

Unlike the *Time Warner* cases, this case does not involve a "binary choice" between the FCC Rate and the TVA Rate. Section 62-350 directs the Commission to consider, in its discretion, "any evidence or rate-making methodologies offered or

proposed by the parties" and to set just and reasonable pole attachment rates "on a case-by-case basis." N.C.G.S. § 62-350. Thus, determination of the just and reasonable rate for Charter's attachments to Blue Ridge's poles requires the Commission to consider the individual facts of this case, as follows:[8]

- *First*, the Commission should set a rate based on actual cost and use data from Blue Ridge, rather than artificial presumptions.

- *Second*, the Commission should consider the parties' actual use of space on the pole and accordingly modify the FCC's space allocation formula to assign at least a portion of the Communications Worker Safety Zone to Charter.

- *Third*, because Charter has offered no evidence to support the illusory notion that it will extend rural broadband in exchange for low pole attachment rates, the Commission should refuse to consider Charter's rural broadband argument in setting attachment rates for Blue Ridge's poles.

- *Finally*, the Commission should consider the alternative rate methodologies and related evidence regarding space allocation and actual use that Blue Ridge has submitted through its rate expert, Mr. Arnett, in order to set a rate that appropriately compensates Blue Ridge for the costs of Charter's attachments to its poles.

A. Section 62-350 Requires the Commission to Set Rates on a "Case-by-Case" Basis Using Actual Data.

Even if the Commission applies the FCC Cable Rate, it should do so using Blue Ridge's actual data, and not the presumptions incorporated into Ms. Kravtin's calculations, in accordance with Section 62-350's directive to set pole attachment rates "on a case-by-case basis."

Contrary to Charter's arguments, the FCC Cable Rate's rebuttable presumptions are just that– *rebuttable presumptions.* The FCC does not require parties to use the FCC

[8] Blue Ridge has submitted with its Proposed Order alternative findings of fact and conclusions to address the use of actual data and proposed modifications to the FCC Cable Rate's space allocation factor, set forth herein.

Cable Rate's presumptions, but instead allows pole owners to rebut those presumptions where actual data is available. *See* 47 C.F.R. § 1.1418 (providing that the presumptions regarding space occupied by cable company's attachment, the amount of usable space, and average pole height "may be rebutted by either party").

In her testimony, Ms. Kravtin argues the Commission should set rates using the FCC Cable Rate's "presumptions," rather than actual data regarding Blue Ridge's pole plant, because those presumptions are "generically applicable" and "streamline the formula process." *See* Kravtin Test, Vol. 4, p. 188. Her position, however, directly contradicts her own testimony *just one page earlier*, where she writes:

> ***As with any presumptive value in the formula, to the extent there is actual (or statistically significant) utility or attacher specific data to support use of alternative space presumptions those can be used in lieu of the FCC's establishes space presumptions***. So, for example, if actual data exists to support use of a 35-foot joint use pole with 11 feet of usable space and 24 feet of unusable space, the space allocation factor would be 1/11 or 9.09%.

Kravtin Test, Vol. 4, pp. 187 (emphasis added). This does not appear to be just a "slip of the pen," either. Ms. Kravtin included the same passage, opining that actual data, where it is available, should be used in place of the FCC Cable Rate's presumptions, in her testimony in the *Time Warner* cases last summer. *See* Exhibit WA-32.

Relying on "presumptions," rather than data regarding Blue Ridge's actual pole costs and pole plant, runs directly contrary to the Commission's duty to set pole attachment rates on a "case-by-case" basis. It also works a particular injustice here, because applying the presumptions only further, and artificially, suppresses the ultimate pole attachment rate Charter pays.

Blue Ridge has introduced uncontroverted evidence, using data from its RUS reports and accounting records,[9] showing actual data rebutting the FCC Cable Rate's "presumptions," as follows:

(1) *Pole Height*. The average height of Blue Ridge's distribution poles, calculated using its continuing property records, is roughly one foot less than the 37.5 feet presumption under the FCC cable rate, resulting in average pole heights of (a) 36.83 feet for 2014, (b) 36.85 feet for 2015, and (c) 36.87 for 2016. *See* Arnett Test. Vol. 2, p. 61-62; Exhibit WA-6.

(2) *Attachment Height*. The FCC cable formula assumes that all entities attaching to the pole require 18 feet of ground clearance, and thus the first attacher will attach at this height, rendering the remainder of the pole "usable space." However, because Blue Ridge's poles are spaced farther apart than is typical, attachers are required to make the first attachment higher on the pole in order to maintain ground clearance. As a result the first available attachment on Blue Ridge's poles based on is yearly average pole height was (a) 21.3 feet in 2014, (b) 21.8 feet in 2015, and (c) 21.26 feet 2016. This necessarily results in less "Usable Space" and more "Support Space" that must be allocated among the attachers. *See* Arnett Test. Vol. 2, pp. 63-65; Exhibits WA-12, WA-13.1, WA-13.2, WA-13.3, and WA-13.4.

(3) *Appurtenance Factor.* This factor represents the percentage of assets other than poles that is included in a utility's "pole account" (*i.e.*, Account 364 under the REA Uniform System of Accounts) in order to properly derive the annual net cost of a "bare pole" on a utility's system. *See* Arnett Test. Vol. 2, p. 61-62; Exhibit WA-7. While the FCC Cable rate presumes an appurtenance rate of 15%, meaning 85% of a utility's Account 364 is attributable to distribution poles, Blue Ridge's true bare pole costs, net of appurtenances, were (a) 87.0% for 2014; (b) 87.29% for 2015; and (c) 87.41% for 2016.

(4) *Number of Attachments / Occupied Space*. The FCC Cable Rate assumes that cable company attachments use only one foot of space, and that a cable company only attaches once to each pole. Blue Ridge's 2015-16

[9] As Blue Ridge noted at hearing, cooperatives' use of the "average value retirement" method, which retires the value of poles which have exceeded their useful life at the then, current average of all poles on Blue Ridge's system, has resulted in Blue Ridge's pole costs being understated in comparison to IOUs. IOUs use "vintage retirement" methods, which retire poles at their original cost. *See* Arnett Test, Vol. 2, pp. 109-11. Even if actual figures are applied for Blue Ridge, the resulting rate would not reflect this accounting difference.

> pole audit (the results of which, Charter does not dispute), showed that Charter had 27,674 attachments on 24,888 poles. This means Charter has an average of 1.11 attachments per pole, which is reflected by showing that it uses 1.11 feet of space as opposed to the FCC Cable rate presumption. *See* Arnett Test. Vol. 2, p. 63.[10]

By ignoring Blue Ridge's actual data and applying only artificial presumptions, Ms. Kravtin manages to drive the FCC Cable Rate down to (a) $5.22 for 2014, (b) $5.20 for 2015, and $5.18 for 2016. *See* Kravtin Test, Vol. 4, p. 172. Tellingly, this result is low even by Charter's own standards. Ms. Kravtin testified during the hearing that Charter pays an average annual attachment rate of $7.20 to IOUs subject to the FCC Cable Rate in North Carolina. *See* Kravtin Test., Vol. 4, p. 172.

Applying Blue Ridge's actual data, however, results in the following rates: (a) $8.49 for 2014, (b) $8.37 for 2015, and (c) $8.31 for 2016. *See* Exhibit WA-33 (providing calculations).

Applying the FCC Cable Rate's presumptions in this case would result in a rate divorced from the actual costs Blue Ridge incurs as a result of Charter's attachments. A rate imposed in such an arbitrary way cannot be either "just" or "reasonable," nor can it satisfy Section 62-350's requirement that the Commission set pole attachment rates on a "case-by-case" basis. Thus, at minimum, the Commission should use actual figures when determining the proper rate for Charter's attachments to Blue Ridge's poles.

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[10] Both the TVA and FCC Cable rate generate a per-pole rate, versus a per-attachment, rate. Thus, developing a rate for those poles on which Charter has two attachments, rather than just one, requires either (i) establishing a separate rate for those poles on which Charter has two attachments, or (ii) adjusting the space attributed to Charter's attachment to reflect that it has an average of 1.1 attachments per pole. As Mr. Arnett explained, these two approaches are mathematically identical. Transcript, Vol. 2, pp. 125-26.

B. The Commission Should Modify the FCC Cable Rate's Space Allocation Formula to Conform to the Parties' Actual Use.

In addition to requiring use of actual data, Section 62-350's mandate that the Commission consider each matter on a "case-by-case basis" likewise requires that it consider the way in which the parties actually use space on Blue Ridge's poles to establish a space allocation formula that is fair to both Charter and Blue Ridge.

Both parties readily concede that the only substantial difference between their proposed methodologies—and indeed all of the methodologies in the record—is the space allocation formula they use to apportion costs. The FCC Cable Rate, the TVA Rate, and the other methodologies Mr. Arnett discusses in his testimony generate rates using the same three factors: (i) the net cost of a bare pole; (ii) annual carrying charges for a pole; and (iii) a space allocation percentage for attachers. *See* Arnett Test., Vol. 2, pp. 49-50. Indeed, the formulas calculate the net costs of a bare pole identically and calculate the annual carrying charges very similarly, so that the only real difference is the final factor—the space allocation percentage. *See id.*

Despite Ms. Kravtin's insistence that her arguments regarding the FCC Cable Rate are somehow dictated by "economics," Congress and the General Assembly have long recognized that matters of space allocation reflect policy decisions, based on considerations of "equity" and fairness. In fact, Congress recognized when it chose to exempt electric cooperatives from FCC regulation under original Pole Attachment Act, that, "ultimately, CATV pole attachment ratesetting involves equity considerations." *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in*, 1978 U.S. Code Cong. & Ad News 109, 126. Section 62-350's requirements that the Commission consider "any

ratemaking methodology" and set rates "consistent with the public interest" reflect a similar understanding.

In terms of space allocation, there are three principal differences between the FCC Cable Rate and the TVA Rate:

(1) The TVA Rate allocates the 3.33 feet (40 inches) of vertical clearance required by the NESC[11] to protect communications workers from electrical facilities exclusively to the communications attachers, while the FCC Cable Rate allocates it entirely to the electric utility;

(2) The FCC Cable Rate accordingly assumes that a cable company attachment uses only "one foot" of 13.5 feet (or 7.41%) of "usable" space at the top of the pole; and

(3) The TVA Rate requires all attachers (including the electric utility) to share the costs of the 24 feet of "Unusable" or "Support Space" equally on a *per capita* basis, while the FCC Cable Rate allocates the costs of this space in proportion to the amount of usable space the attacher occupies (*i.e.*, 7.41%).

See Arnett Test., Vol. 3, pp. 53-54.

Of these differences, the FCC Cable Rate's allocation of the *entire* Communications Worker Safety Zone to the electric utility is the most glaring and patently unfair aspect of its methodology. Contrary to Charter's assertions, Blue Ridge does not derive any benefit from the Communications Worker Safety Zone. *See* Arnett Test, Vol. 2, pp. 57-58. The NESC requires this space in order to protect

[11] *See* NESC, C2-2017 Edition, Rule 235.

communications workers—*i.e.*, cable company personnel—who do not wear protective equipment and are not trained to work with energized electrical facilities. *Id.* Thus, the Communications Worker Safety Zone is only required because a communications attacher has attached to the pole. Put another way, an electric cooperative could use this space to install electrical facilities or install shorter (and cheaper) poles if there were no communications attachers. *Id.*

Indeed, allocating the Communications Worker Safety Zone entirely, and exclusively, to electric cooperatives is so extreme, Charter's own expert witness cannot find a consistent rationale to support it. Ms. Kravtin asserts that the FCC Cable Rate rests on the "fundamental economic principle of cost-causer pays"—meaning that an attacher should pay for all costs that would not be borne by the utility, but for the attachment. *See* Kravtin Test., Vol. 4, p. 184.[12] However, on cross examination, Ms. Kravtin conceded that the Communications Worker Safety Zone would not be required, *but for* the presence of communications companies' attachments. *See* Kravtin Test., Vol. 5, p. 34 (admitting that, until a communications company attaches to a pole, "there's no need for those safety clearances"). This admission exposes Ms. Kravtin's theory as mere results-oriented reasoning: If she were really adhering to the doctrine of "cost-causer-pays," Charter and other communications attachers—not Blue Ridge—would share the cost of the Communications Worker Safety Zone.

[12] Although she claims that "cost-causer-pays" is a "fundamental" economic principle, Ms. Kravtin could not identify any economic literature to support it. *See* Kravtin Test., Vol 5, p. 33-34.

Ultimately, Ms. Kravtin turns to *benefit* and *value of service* theories—the very approaches the Commission rejected in the *Time Warner* cases[13]—to justify allocating the Communications Worker Safety Zone to Blue Ridge. She thus argues that Blue Ridge should be required to pay for the *entire* Communications Worker Safety Zone, because the NESC allows electric utilities to install streetlights in that space, even though Blue Ridge does not do so. *See* Kravtin Test., Vol. 4, p. 209. Even then, her argument does not work: Uncontroverted evidence shows Blue Ridge does not install streetlights in this space. *See* Layton Test., Vol. 1, p. 82. Moreover, the NESC also allows electric utilities to install streetlights above and below the Communications Worker Safety Zone, as well. *See* Arnett Test., Vol. 2, p. 57. Accordingly, Blue Ridge does not need the Communications Worker Safety Zone to install streetlights (and does not "cause" the space to exist), given that it could install streetlights even if poles did not include this space. *Id.*

Modifying the FCC Cable Rate to correct just this defect, by requiring the parties to at least share the costs of the Communications Worker Safety Zone equally, results in a much more reasonable outcome than Charter proposes. If the Communications Worker Safety Zone were apportioned equally among Blue Ridge's average 2.35 attachers (which includes Blue Ridge), Charter would be responsible for another 1.42 feet of usable space (3.33 ÷ 2.35 = 1.417) in addition to the 1.1 feet already attributed to its attachments (using actual data). This would result in a space allocation factor of 18.67 percent (2.52

[13] *See Time Warner* Order, pp. 42-43.

feet ÷ 13.5 feet of "Usable Space" = 0.1866).[14] Applying this space allocation factor to the FCC Cable Rate, using the actual data calculated by Mr. Arnett, would result in pole attachment rates of: (a) $13.59 for 2014; (b) $13.47 for 2015; and (c) $13.44 for 2016.

The Commission should consider common-sense, equitable modifications to the FCC Cable Rate—at a minimum requiring Charter to pay a proportionate share of the Communications Worker Safety Zone, as set forth above. Doing so results in an allocation of costs that more closely reflects the parties' actual use of the pole, and more fairly compensates Blue Ridge's for the costs "caused" by Charter's attachments.

C. The Commission Should Disregard Charter's Promises of Rural Broadband Expansion when Considering the Public Interest.

Section 62-350's mandate to set pole attachment rates in a manner "consistent with the public interest" requires the Commission to do more than accept Charter's illusory promises regarding expansion of rural broadband at face value. Charter has not presented any evidence—other than the theoretical musings of its hired expert witness, Ms. Kravtin—to show that it would extend broadband to any additional customers if the Commission applies the FCC Cable Rate. Thus, even if rural broadband were the singular, overriding public interest Charter claims it to be, it would still not justify application of the FCC Cable Rate in this case.

Charter has no obligation to serve Blue Ridge's members, or anyone else. Mr. Martin openly admitted during the hearing that Charter is free to pick and choose who it serves based on population density and profitability. *See* Martin Test., Vol. 4,

[14] This space allocation does not incorporate the reduction of "usuable space" required by the longer average spans between Blue Ridge's poles, resulting in a higher average first point of attachment.

pp. 154-55. Maps Blue Ridge introduced show Charter has done just that—choosing to serve only the most densely populated portions of Blue Ridge's territory. *See* Exhibit LL-2. Charter's policies exacerbate this problem. According to Mr. Mullins, Charter will only extend service to customers who live within 250 feet of Charter's existing distribution lines. *See* Mullen Test., Vol. 4, pp. 16-18. Thus, only a small subset of Blue Ridge's members have any hope of receiving Charter's services. Indeed, when asked during discovery, Charter responded that it serves areas with 53 homes per mile in areas that include Blue Ridge's territory. *See* Exhibit LL-1, Interrog. No. 37. By contrast, Blue Ridge is required by law to serve everyone within its territory, regardless of costs, and its service territory averages only nine electric meters per mile. *See* Layton Test., Vol. 1, pp. 32-33. *Id.*; Exhibit LL-2; Exhibit Ex. LL3.

Yet, even though it is asking the Commission to award a low pole attachment rate in order to subsidize broadband, Charter has not offered any evidence in this case to show that it will actually extend broadband to any new customers if the Commission awards its desired rate. Charter's witnesses did not identify any plans to expand broadband within Blue Ridge's territory. Likewise, Ms. Kravtin was forced to concede her arguments regarding the expansion of broadband rest only merely a "generic analysis," and not any evidence specific to Charter or its facilities in Blue Ridge's territory. *See* Kravtin Test., Vol. 5, pp. 102-03.

In short, Charter has not given the Commission any evidence to support a conclusion that low pole attachment rates will support broadband deployment. Instead, imposing the FCC Rate will only cause Blue Ridge's members—rural electric ratepayers in some of the poorest counties in the State—to subsidize Charter's for-profit operations,

even though most of Blue Ridge's members live too far away from Charter's lines to ever have the option to receive Charter's services.

D. The Commission Should Consider the Alternative Rate Methodologies Blue Ridge has Presented.

Finally, in addition to a case-by-case analysis, Section 62-350 requires the Commission to consider the alternative rate methodologies to properly set a just and reasonable rate for Charer's attachments to Blue Ridge's poles.

Unlike the *Time Warner* cases, this case does not present a "binary choice." Instead, Blue Ridge, through Mr. Arnett, has introduced evidence regarding a series of potential pole methodologies for the Commission's consideration. These include (1) the American Public Power Association rate (the "APPA Rate"), which is based on rates adopted in court proceedings Seattle, Washington; (2) the "Telecom Plus Rate" considered by the United States House of Representatives; and (3) the rate methodology adopted by the Arkansas Public Service Commission ("APSC"). *See* Arnett Test., Vol. 2, pp. 114-15; Exhibits WA-24 and WA-33.

Application of these rates to Blue Ridge's poles reveals that the FCC Rate—not the TVA Rate—is the true "outlier" formula. Indeed, as Mr. Arnett testified, all of the rate methodologies presented in this case differ only in terms of how they allocate the Supply Space and Communications Worker Safety Zone. *See* Arnett Test., Vol. 2, pp. 77-78. Mr. Arnett introduced charts explaining the various space allocation percentages assigned to cable attachers under these methodologies, which range from 18.9%, in the case of the APSC rate, to 27%, in the case of the APPA rate. This places the FCC Cable Rate, which only allocates 7.4% of the costs to the cable attacher, on the extreme low end of the range. The same is true of the rates these formulas produce.

Using 2016 data, these methodologies result in a range of rates from $17.05 per pole in the case of the APSC Rate to $28.54, in the case of the APPA Rate—which is even higher than the TVA formula. *See* Exhibit WA-33. In contrast, the FCC Cable Rate would result in a rate of only $5.18 per attachment using the formula's presumptions, and a rate of $8.31 when using actual Blue Ridge data, as set forth above.

Reviewing these methodologies—and the various methods by which they seek to derive just and reasonable pole attachment rates—exposes the FCC Cable Rate for what it is: A methodology deliberately designed to grant communications companies, like Charter, access to fully-constructed pole plants, while paying only a small fraction of the pole owners' annual costs. The Commission accordingly should consider alternative methodologies and potential modifications to the FCC's lop-sided space allocation formula in order to ensure Blue Ridge's members are not required to subsidize the operations of for-profit communications companies, like Charter.

III. THE TERMS AND CONDITIONS BLUE RIDGE HAS PROPOSED FOR THE PARTIES' POLE ATTACHMENT AGREEMENT ARE JUST AND REASONABLE.

The terms and conditions Blue Ridge has proposed to govern Charter's attachments to its poles are just and reasonable, and therefore should be approved for inclusion any new pole attachment agreement between the parties.

Indeed, the terms and conditions Blue Ridge has proposed are not new. Instead, they are the same terms and conditions Charter accepted twice before as part of its 2003 and 2008 Agreements with Blue Ridge. *See* Layton Test, Vol. 1, pp. 59, 66; Exhibit LL-3 and LL-4. Both agreements—which use the same form—were the result of arms-length

negotiations between the parties. Although Charter now insists that these provisions are somehow "unfair," Charter never requested any changes to the language of the 2003 and 2008 Agreements when it negotiated them, but instead chose to focus only on the rate. *See* Layton Test, Vol. 1, p. 37; Mullins Test., Vol. 3, p. 289 ("Q. And sitting here today do you have any information of a single proposed term that Charter asked Blue Ridge to change? A. No, I do not.")

The fact that Charter has agreed to each of the terms and conditions Blue Ridge has proposed twice before, and operated under them for more than a decade, is strong evidence that they are, in fact, reasonable. *See Time Warner* Order, p. 52 (noting that prior agreements between attachers and cooperatives, even if entered prior to the enactment of Section 62-350 provide evidence of "reasonableness as to the terms contained therein").

Similarly, Blue Ridge has not attempted to "single out" Charter by seeking to confirm these terms, as its witnesses have tried to claim.[15] As Mr. Layton testified, Blue Ridge's agreement with Morris Broadband—the only third-party attacher with whom Blue Ridge has signed a new agreement since the passage of Section 62-350—is identical to Charter's 2003 and 2008 Agreements—and thus the terms and conditions Blue Ridge proposes here. *See* Layton Test, Vol. 1, p. 73.

Blue Ridge has also shown it has good reason to seek the contractual projections afforded by its proposed terms and conditions based on Charter's track record.

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[15] In his testimony, Mr. Mullins mistakenly focused his efforts on comparing the terms of Charter's agreements with Blue Ridge to the terms of Blue Ridge's contracts with joint users. However, Mr. Layton explained, "joint use agreements involve arrangements between two pole owners to use one another's poles. They therefore are fundamentally different from agreements with third party attachers." Layton Test. Vol. 1, pp. 71-72.

First, Blue Ridge's 2015-16 pole audit found Charter had 1,373 unauthorized attachments to Blue Ridge's poles, demonstrating the need for the parties to use the formal, application process set forth in the agreements to properly account for Charter's attachments to Blue Ridge's system. Layton Test., Vol. 1, pp. 49-51.

Second, Charter has a history of poor workmanship and poor supervision of the contractors it uses to make attachments to Blue Ridge's poles, which has resulted in numerous safety violations.

As shown through cross examination of Charter's witnesses:

- Charter does not employ any professional engineers to use or review its attachments or ensure they comply with the NESC, Charter's design specifications, or other applicable standards. *See* Martin Test., Vol. 4, p. 122.

- Charter uses contractors to conduct substantially all of its attachment activities on Blue Ridge's poles, but provides virtually no oversight over them, inspecting only 10-15% of their work. *See* Mullins Test., Vol. 4, p. 62.

- Charter has no defined safety program, as required by NESC Rule 214, but instead only identifies safety issues if and when it happens to come across a problem in the course of its other work. *See* Mullins Test., Vol. 4, p. 60; Martin Test., Vol. 4, p. 126.

- Charter relies on pole owners, like Blue Ridge, to inspect Charter's attachments for compliance with design and safety standards. Martin Test., Vol. 4, p. 125.

In light of these shortcomings, it is hardly surprising Charter has consistently failed to comply with NESC and applicable design standards, causing thousands of safety violations and compliance issues among its attachments. Indeed, even though it was not meant as a safety inspection, Blue Ridge's 2015-16 pole attachment audit identified more than 3,767 safety violations among Charter's attachments. *Id.* And, while Charter

insists in its filed materials that this is somehow not the case, its witnesses conceded at hearing that they turned down an opportunity to ride along with the auditor because "we [have] found their information is accurate." Mullins Test., Vol. 4, pp. 10-11. Mr. Booth's inspection of five randomly-selected circuits on Blue Ridge's system in the fall of 2017 showed that Charter had at least one violation on 43% of the poles to which it was attached. *See* Booth Test, Vol. 3, pp. 75-79.

At hearing Mr. Layton and Mr. Booth introduced numerous pictures showing safety violations among Charters attachments including, (1) "safety space" issues, where Charter has attached its facilities too close to Blue Ridge's electrical equipment, posing a risk to Charter's workers and the public, and preventing Blue Ridge from using its allocated space on the pole; (2) failures to properly guy and anchor its attachments, stressing and breaking poles; (3) insufficient ground clearance, endangering pedestrians and vehicles; and (4) failures to properly bond its attachments, posing a risk of electrocution to workers and the public. *See* Layton Test, Vol. 1, pp. 51-54; Booth Test., Vol. 3, pp. 127-29.

As these conditions show, Blue Ridge's request that the Commission approve its proposed terms and conditions—*which Charter has agreed to and accepted twice before*—is more than justified. Blue Ridge requires these terms to ensure Charter's compliance with its obligations as well as the safety and reliability of Blue Ridge's system.

IV. THE COMMISSION SHOULD APPROVE THE INDIVIDUAL TERMS AND CONDITIONS BLUE RIDGE HAS PROPOSED.

Informed by the foregoing circumstances, Blue Ridge submits that the individual terms and conditions it has presented to the Commission for approval, discussed in turn below, are just and reasonable and therefore should be approved for inclusion in a new pole attachment agreement with Charter.

A. *Requirements Regarding New Attachments to Mainline Poles, Attachments to Drop Poles (a/k/a Secondary Poles),* and *Overlashing*.

i. Applications for New Attachments.

The 2003 and 2008 Agreements required Charter to submit an application, pay an application fee, and obtain a permit from Blue Ridge for each attachment to Blue Ridge's mainline poles, following a procedure set out in the agreements. *See* Exhibits LL-3 and LL-4, Article 5 ("Process for Permitting Attachments"). During the course of the parties' negotiations for a new agreement, however, Charter insisted that it should only be required to submit applications for projects that involve ten or more attachments. *See* Layton Test, Vol. 1, p. 60.

It appears that Charter now finds Blue Ridge's proposed permitting provisions acceptable. In his written testimony, Mr. Martin conceded that, despite its negotiating position, Charter is willing to agree to the permitting procedures for new attachments to mainline poles set forth in the 2008 Agreement. *See* Martin Test., Vol. 4, p. 86. Accordingly, the Commission should approve the permitting procedure set forth in the 2008 Agreement for inclusion in the parties' new pole attachment agreement.

ii. Attachments to Drop Poles (a/k/a "Secondary Poles").

Charter's 2003 and 2008 Agreements with Blue Ridge allow Charter to make attachments to so-called "Secondary Poles" or "Drop Poles"—which are poles installed solely to provide ground clearance on a service loop to a single customer's home—without seeking prior approval from Blue Ridge, *so long as* Charter submits permit applications for all attachments to secondary poles at the end of each month. *See* Exhibits LL-3 and LL-4, Article 6 ("Secondary Pole Attachments").

Despite having agreed to submit monthly reports of the attachments it makes to secondary poles on Blue Ridge's system, Mr. Mullins admitted that Charter, which uses contractors to install attachments to secondary poles, has no way to track those attachments. *See* Mullins Test., Vol. 4, pp. 14-15. Instead, Mr. Mullins has offered that Blue Ridge could "reconcile" secondary attachments by conducting inventories of its attachers every five years, with Charter agreeing to pay "back rent." *Id.*

While Blue Ridge understands the practical reasons why Charter has asked to apply for secondary pole attachments after-the-fact—Charter's proposed "solution" is inadequate to protect Blue Ridge's interests. The permitting process is necessary to ensure accurate accounting records, and requires Charter to certify that its attachments comply with the agreement's specifications, the NESC, and applicable safety standards—which is vitally important to Blue Ridge. Asking Blue Ridge to allow Charter to make any number of attachments to Blue Ridge's system without any notice at all simply goes too far, and denies Blue Ridge any reasonable opportunity to ensure the safety and reliability of its system.

iii. Overlashing.

Overlashing is a method Charter uses to add aerial facilities by running new cable (or cables) over an existing cable and then lashing them together. *See* Layton Test., Vol. 1, p. 65; Booth Test., Vol. 3, p. 96.

As with the other terms and conditions Blue Ridge has submitted to the Commission, Charter's 2003 and 2008 Agreements with Blue Ridge required Charter to provide prior notice and follow the permitting process set forth in the agreement before overlashing additional cables to its existing attachments on Blue Ridge's system. *See* Exhibit LL-3 and LL-4, Article 7 ("Overlashing").

Blue Ridge has good reason to require Charter to get prior approval and follow the usual permitting process before it engages in overlashing. Overlashing multiplies the surface area of Charter's cables, substantially increasing wind and ice loads on Blue Ridge's poles. Latyon Test., Vol. 1, pp. 65-66; Booth Test., Vol. 3, pp. 132-33. As Mr. Booth testified, the NESC, specifically Sections 25 and 26, requires that an attacher conduct analysis, design, and strengthening to ensure that and attachments are sufficient to accommodate overlashed facilities. *See* Booth Test, Vol. 3, pp. 97-98. Yet, despite this, Mr. Martin admitted that Charter does not conduct any loading analysis before overlashing cables to Blue Ridge's poles. *See* Martin Test. Vol. 4, p. 124-25. Indeed, Mr. Mullins, admitted that, although wind and ice are often an issue in Blue Ridge's service territory, he had no idea what wind or ice loading factor applied to Blue Ridge's poles. *See* Mullins Test, Vol. 4, pp. 50-52.

The procedures set forth in the 2003 and 2008 Agreement, which require Charter to first obtain a permit before overlashing (but not pay annual pole attachment fees

thereafter) are reasonable and necessary to ensure Blue Ridge has notice of Charter's overlashed facilities and an opportunity to review and approve the design and construction of those facilities before they are installed.

B. *Disputed Invoices*.

While Blue Ridge agrees that Charter should have the right to dispute invoices under the parties' pole attachment agreement, Charter has insisted on provisions that would allow it to withhold payment on any "disputed" invoices until the dispute is resolved. Charter's proposal would create an incentive for Charter to dispute legitimate amounts owed to Blue Ridge and work less than efficiently to resolve disputes when they arise. Contrary to Charter's assertions, Blue Ridge has reason to fear this will happen: Charter unilaterally refused to pay at least two invoices in 2017 for make-ready work necessary to accommodate its attachments, even though the amounts reflected in those invoices were not subject to any dispute. *See* Layton Test., Vol. 1, pp. 60-61.

Allowing Charter to avoid its obligations, as it has already shown it is prone to do, by "disputing" invoices that are otherwise not in dispute invites abuse. Charter should be required to pay invoices pending resolution of any dispute, just as it was required to do under the 2003 and 2008 Agreements.

C. *Engineering Certification*.

Charter's 2003 and 2008 Agreements with Blue Ridge both required Charter to provide, within 30 days after completing the last attachment covered by an application, a certification from a professional engineer that Charter's attachments to Blue Ridge's poles "are of sound engineering design, fully comply with the [Rules specified in the agreement], th[e] agreement and the latest addition of the National Electric Safety Code,

and were constructed as provided in the Make Ready Engineering Plans" Charter provided in its application. *See* Exhibits LL-3 and LL-4, Section 5.9.[16] Both require Charter to make this certification in a form attached to the agreements, which requires a professional engineer's signature. *See* Exhibits LL-3 and LL-4, Section 5.9; Exhibit B-5.[17]

Yet, despite having agreed to these provisions twice before without any request for modification, Charter has now refused to do so in its current negotiations with Blue Ridge, and instead proposes that it (i) should be allowed to provide certification from an "authorized representative," and (ii) should not have to provide any certification with respect to secondary or "drop" poles that serve a single house. *See* Martin Test., Vol. 4, p. 88.

As the Commission held in the *Time Warner* cases, Charter's proposal to provide certification from only "an authorized representative"—which could be any employee—is inadequate to address Blue Ridge's safety concerns and assure it that Charter's attachments comply with the NESC and applicable safety standards. *See Time Warner* Order, pp. 62-63. Indeed, Mr. Booth testified in this case that certifying attachments comply with the NESC, "are of sound engineering design," and fully comply with the specifications in Charter's agreement, constitutes the practice of engineering. *See* Booth Test., Vol. 3, pp. 21-22. He also introduced guidance from the North Carolina Board of

[16] Both agreements require Charter to make the same certification with respect to "secondary" or "drop" poles as well. However, because the agreements allow Charter to seek permits for secondary poles after they are already made, the 2003 and 2008 Agreements also expressly provide that, "Owner intends to rely on Licensee's certification on the Application for Secondary Pole Attachment that all Secondary Pole Attachments . . . fully comply with the requirements of this Agreement," which include compliance with the NESC. *See* Exhibits LL-3 and LL-4, Section 6.4.

[17] Despite Charter's complaints, Blue Ridge has not "singled out" Charter in requiring professional engineer certifications. Blue Ridge's agreement with Morris Broadband includes the same requirement. *See* Exhibit LL-17.

Examiners for Engineers and Land Surveyors, advising that providing such a certification would require a professional engineer's license, and that doing so without such a license would violate N.C.G.S. § 89C-3(6). *See* Exhibit GLB-2R.

The Commission similarly concluded in the *Time Warner* cases that it could not lawfully permit cable companies to allow an "authorized representative" to provide this such certifications, explaining:

> [T]he Commission notes that TWC's proposal to allow an "authorized representative" to certify that the attachments are "of sound engineering design and fully comply with the safety and operational requirements of the Agreement, including without limitation the National Safety Code" would appear to run afoul of G.S. 89C-2 which states that it "shall be unlawful for any person to practice or offer to practice engineering in this State, [as the term is] defined in the provisions of this Chapter[], unless the person is duly licensed." Because of this prohibition, the Commission could not and cannot approve of the inclusion of such a provision in any contract which comes before the Commission. If the Commission were to do so, it would be in violation of G.S. 89C-23 which requires "all duly constituted officers of the State and all political subdivisions of the State to enforce the provisions of this Chapter and to prosecute any persons violating them." G.S. 89C-23. Accordingly, for the aforementioned reasons, [the Cooperatives] may include in the parties' pole attachment agreement [the Cooperative's] proposed provision requiring TWC to provide certification from a professional engineer that the design and construction of its attachments comply with applicable safety standards.

Time Warner Order, p. 63.

Given the requirements of North Carolina law and the Commission's prior analysis, Blue Ridge's request that Charter be required to provide a certification from a professional engineer that the attachments comply with the NESC and applicable safety standards—just as Charter has agreed to do in its two previous agreements—is entirely reasonable.

D. *Maintenance and Transfers.*

In its 2003 and 2008 Agreements with Blue Ridge, Charter agreed that it would transfer attachments to a new pole, or relocate them, within sixty (60) days of receiving a request from Blue Ridge, which are provided through the National Joint Use Notification System ("NJUNS"). *See* Exhibits LL-3 and LL-4, Section 9.6. Charter also agreed that, if it failed to transfer its facilities in this time period, it would pay "Unauthorized Attachment" fees, as provided by the agreement, and would also pay Blue Ridge's expenses to the extent it had to send out additional crews or do additional work as a result of Charter's delay. *Id.*

Despite agreeing to these provisions, Charter has persistently failed to respond to Blue Ridge's transfer requests. Mr. Layton testified that, according to the NJUNS tracking system, Charter had failed to respond to nearly 139 currently outstanding transfer requests for which it was the next to go, and that nearly a quarter of those had been outstanding for more than three years. *See* Layton Test., Vol. 1, pp. 58-59. As Mr. Layton explained, this causes Blue Ridge significant burden and costs. Blue Ridge issues transfer requests in order to, among other things, install transformers to serve new customers, replace old poles, and relocate existing distribution lines. *Id.* If Blue Ridge is installing a transformer to provide service to a new member, Charter's failure may delay Blue Ridge's ability to connect electricity to the members' home. *Id.* Likewise, if Blue Ridge is replacing or moving existing poles and Charter fails to timely respond to its transfer requests, Ridge will be forced to leave the old poles in place, cannot complete its work, and may have to re-mobilize crews to complete the work when Charter finally complies. *Id.*

Blue Ridge requires adequate contractual protection to ensure Charter complies with its transfer requests and reimburses Blue Ridge's for the administrative burden, costs, and delays Charter causes when it fails to timely respond to those requests. Blue Ridge accordingly requests that the Commission approve the procedures in the 2003 and 2008 Agreements regarding transfer requests for inclusion in the parties' new pole attachment agreement.

E. *Non-Compliant Attachments*.

Article 11 of the 2003 and 2008 Agreements requires that Charter provide a plan to correct non-compliant attachments or safety violations within forty-five (45) days of receiving a notice from Blue Ridge (through NJUNS), which then must be approved and completed in accordance with a timeline set forth in the agreements. Exhibits LL-3 and LL-4, Article 11 ("Non-Compliant Attachments"). The same article allows to Blue Ridge to revoke permits for attachments if Charter failed to respond to its notices. *Id.* Yet, in the current negotiations, Charter has insisted that it should only have to respond to Blue Ridge's notices within an undefined, "reasonable time." It also has insisted that it should not have to pay to correct non-compliant attachments unless Blue Ridge can prove Charter "caused" the violation, and that Blue Ridge should not have the right to revoke Charter's permit if it fails to correct the violation. *See* Martin Test., Vol. 4, pp. 97-99

Charter's proposals are insufficient to resolve the well-documented issues concerning its non-compliant attachments and the serious issues posed by Charter's numerous safety violations. Blue Ridge must have an adequate contractual mechanism to require Charter to correct safety violations and other deficiencies in its attachments,

which must include definite timelines for responses and remedies if Charter fails to make progress toward correcting them.

Moreover, Charter's insistence that it should only be required to correct non-compliant attachments if Blue Ridge can show Charter "caused the violation," is an invitation for endless dispute. Indeed, Charter's response to the specific safety violations Mr. Layton and Mr. Booth identified in their testimony reveals Charter will do virtually anything to avoid responsibility for the company's safety violations, no matter the facts. In responding to pictures contained in Mr. Layton's testimony, Mr. Mullins falsely argued that Blue Ridge must have been at fault for safety space violations, because Charter's plant had been in place for "more than 30 years"—even though the pole at issue bore a 1998 date stamp and had been subject to relocation requests. *See* Layton Test., Vol. 1, pp. 96-97. Elsewhere, Mr. Mullins asserted that Charter should not be responsible for ground clearance violations, because the telephone attacher—which was attached above Charter's lines—would have to relocate its attachments before Charter could correct the violation. *See* Layton Test., Vol. 1, pp. 94. (Mr. Mullins, however, ignores that Charter hung its lines too low in the first place.) Indeed, Mr. Mullins went so far that, in response to one violation—involving a climbing space violation where Charter attached communications boxes and risers on both sides of a *transmission* pole—he attached a carefully taken picture that obscured Charter's equipment in order to argue it had not attached any communication box at all. *See* Layton Test., Vol. 1, pp. 95. Unfortunately for Mr. Mullins, the bolts attaching the communications box were still visible. *Id.*

Blue Ridge does not have the resources to litigate each and every safety violation Charter has caused. Moreover, in direct contrast to Charter's conduct, Blue Ridge has shown that it is willing to work with Charter to correct these violations and has proactively offered to extend contract deadlines to correct existing violations, so long as Charter makes reasonable progress toward fixing them. *See* Layton Test, Vol. 1, pp. 48-49. If anything, this proves the process set forth in the 2003 and 2008 Agreements is a reasonable and workable. The Commission should therefore approve that process for inclusion in future pole attachment agreements between the parties.

F. *Insurance.*

As in the 2003 and 2008 Agreements, Blue Ridge has asked that Charter agree to maintain coverages for worker's compensation, commercial general liability, and automobile liability insurance sufficient to meet requirements imposed by the Rural Utilities Service, the government agency that provides loans to finance construction of Blue Ridge's system. *See* Exhibits LL-3 and LL-4, Article 20. Blue Ridge has done this because RUS mandates all of its borrowers require third parties working on their system to provide proof of such insurance. *See* 7 C.F.R. § 1788.48.

Yet, despite having agreed to this requirement in both the 2003 and 2008 Agreements, Charter now has objected, and insists that it is willing to maintain only such coverages "as determined by Charter's risk management." *See* Martin Test., Vol. 3, p. 109. Charter's position, however, amounts to no commitment at all, as it would allow Charter to drop or decrease its coverage at any time. Blue Ridge's proposed insurance requirements are reasonable and consistent with both RUS regulations and industry practice.

G. *Default Remedies*.

The 2003 and 2008 Agreements included well-defined provisions establishing the parties rights in the event of default, including rights to notice and cure. *See* Exhibit LL-3 and LL-4, Article 23 ("Default"). In the course of the parties' negotiations for a new pole attachment agreement, however, Charter refused to agree to reasonable default provisions, and instead proposed language that would severely limit Blue Ridge's rights in the event Charter failed to perform its contractual obligations. *See* Layton Test., Vol. 1, pp. 63.

It appears this issue may now be resolved. In his testimony, Mr. Martin proposes a default provision that he asserts "is consistent with the 2008 agreement." *See* Martin Test., Vol. 107. While Mr. Martin proposes different language, it appears Charter finds the default provisions in the 2008 Agreement acceptable. Blue Ridge accordingly asks that the Commission approve those provisions for inclusion in a new pole attachment agreement between the parties.

H. *Indemnity*.

The 2003 and 2008 Agreements included indemnity provisions that required Charter to indemnify and defend Blue Ridge against claims arising from Charter's operations or attachments. *See* Exhibit LL-3 and LL-4, Article 24 ("Indemnity and Hold Harmless"). Blue Ridge also agreed, in the same provisions, to hold Charter harmless for any and all claims that arise solely from Blue Ridge's actions, omissions, or negligence, but not to indemnify Charter for third party claims. *Id.*

Despite twice agreeing to these provisions, Charter now insists that any indemnity provision ought to be "mutual" or "reciprocal." However, it would be inappropriate to

require Blue Ridge to indemnify Charter, given that Blue Ridge has no choice but to allow Charter on its poles.

Blue Ridge submits that the arrangement reflected in the 2003 and 2008 Agreements—which Charter has twice accepted without objection—is a reasonable provision in light of the parties' statutory relationship. Indeed, such a provision is especially important given the widespread safety violations Blue Ridge has discovered among Charter's existing attachments, including attachments made outside of the space allocated to Charter.

I. *Reservation of Space*.

Unlike the *Time Warner* cases, Blue Ridge's requested reservation of space provisions have been included in Charter's agreements for more than a decade, Blue Ridge has instructed all of its attachers to follow these same requirements, and Mr. Mullins acknowledged at hearing that Charter has accepted and implemented the requirement by instructing its contractors to attach below Blue Ridge's reserved space for many, many years. *See* Mullins Test, Vol. 4, p. 37

The 2003 and 2008 Agreements both required Charter to attach its facilities at least 72 inches below Blue Ridge's grounded neutral, to ensure Blue Ridge had sufficient clearance on the pole to install future electric facilities without requiring Charter to relocate or transfer. *See* Exhibit LL-3 and LL-4, Exhibit B, ¶ 12. Blue Ridge also provided a training manual to all of its attachers at least as far back as 2006, including Charter's construction coordinators, setting out this requirement. *See* Layton Test., Vol. 1, p. 6; Exhibit LL-13.

The purpose of this "Reservation of Space" is simple: It ensures Blue Ridge is able to use the electric supply space that is allocated to it (and for which it pays under the applicable rate formulas), and that it is able to install additional facilities, such as transformers, in order to provide service to new customers, while still maintaining the 40 inches of vertical clearance between Charter's attachments and Blue Ridge's energized conductors required by the NESC. Charter concedes, at least in principle, that Blue Ridge's reservation of space requirement is acceptable. *See* Mullins Test., Vol. 3, p. 106. Likewise, when he was asked on cross-examination, Mr. Mullins responded that Charter already instructs its contractors to attach 72 inches from Blue Ridge's neutral, unless Charter has permission to attach at 40 inches. *See* Mullins Test, Vol. 4, p. 37. Thus, Charter is objecting to a practice it has already agreed to and implemented.

Moreover, contrary to Charter's arguments, the reservation of 72 inches of space is not arbitrary, but instead a result of engineering designs for fully built-out poles based on RUS specifications. *See* Exhibit LL-13, at fig. 2.0; Booth Test, Vol. 3 pp. 191-94. Likewise, Blue Ridge has required such a reservation of space (appropriately tailored, depending on whether the party is a telephone or cable attacher) from all of its attachers. *See* Layton Test., Vol. 1, p. 6; Exhibit LL-13.

In sum, Charter (i) has already agreed to identical reservation of space provisions in the 2003 and 2008 Agreements, (ii) concedes that such a reservation of space is acceptable, and (iii) and has requests its contractors to implement it. The Commission should accordingly approve the reservation of space provision in the 2003 and 2008 Agreements as just and reasonable.

J. *Recovery of Space*.

It appears from the proceedings that Charter does not dispute Blue Ridge's proposed terms regarding recovery of space. The 2003 and 2008 Agreements provided that, if Blue Ridge required additional space on its poles, Charter must move or relocate its facilities, within 30 days of receiving notice (or within 10 days if the space is needed in order for Blue Ridge to provide electrical service to one of its members). *See* Exhibit LL-3 and LL-4, Article 15 ("Recovery of Space"). Though Mr. Martin appeared to argue with this provision in his deposition, *see* Martin Test., Vol. 4, p. 101, he conceded in his written testimony that "Charter would agree to reasonable language similar to the language in the 2008 agreement that allows Blue Ridge to recover space for its core utility service." *Id*.

A recovery of space provisions is an industry standard term. Mr. Arnett testified that, of the hundreds of agreements he has reviewed, he has never seen a third-party pole attachment agreement that did not include a recovery of space provision. *See* Arnett Test, Vol. 3, pp. 26-28. Accordingly, given Charter's apparent concession, the Commission should approve the recovery of space provisions in the 2008 Agreement as just as reasonable for inclusion in future agreements between the parties.

K. *Unauthorized Attachments.*

Although the 2003 and 2008 Agreements required Charter to pay an unauthorized attachment fee, in addition to back rent, in the event it made unauthorized attachments to Blue Ridge's system, *see* Exhibits LL-3 and LL-4, Article 10 ("Unauthorized Attachments"), Charter has now refused to agree to any such provision. Instead, Charter proposes that it should only pay the five years' back rent—*i.e., the rent Charter should*

have paid in the first place—if Blue Ridge discovers it has made unauthorized attachments.

Charter's proposal is inadequate. Charter has conceded in this proceeding that it regularly makes unauthorized attachments to Blue Ridge's poles, acknowledging that the 2015-16 Audit revealed it had more than 1,300 attachments. Charter has also admitted that it has no process for tracking the attachments its contractors make to secondary poles. Under Charter's proposal, it would actually be to Charter's advantage to make unauthorized attachments, and then pay the rent it should have otherwise paid only if its attachments are discovered. Charter's proposal would thus incentivize Charter to ignore the contract's permitting provisions and would deny Blue Ridge any mechanism to ensure Charter complies with those provisions in the future.

Charter also has conceded that unauthorized attachment fees are common in pole attachment agreements. At hearing Mr. Martin acknowledged that Charter's contracts with Duke Energy—an IOU regulated by the FCC—require it to pay unauthorized attachment fees in addition to back rent for unauthorized attachments. *See* Martin Test, Vol. 4, pp. 118-19.

Blue Ridge's proposal regarding unauthorized attachments—which Charter has now accepted twice before and has likewise accepted as part of other, FCC-regulated contracts—are just and reasonable and accordingly should be approved for inclusion in a new pole attachment agreement between the parties.

* * *

In sum, Blue Ridge has merely asked that the Charter agree to the same terms and conditions it accepted—*without any negotiation whatsoever*—as part of its 2003 and 2008 Agreements with Blue Ridge. These terms and conditions are just, reasonable, and necessary to protect Blue Ridge's legitimate interest in ensuring it is able to deliver safe and reliable power to its members. The Commission, therefore should approve these terms for inclusion in Charter's pole attachment agreement with Blue Ridge.

CONCLUSION

As set forth above, the Commission should resolve this case in a manner consistent with Section 62-350's requirement that rates, terms, and conditions be set "on a case-by-case" basis. Blue Ridge accordingly requests that the Commission (i) deny Charter's counterclaim for so-called "true up" payments; (ii) set a just and reasonable pole attachment rate, using Blue Ridge's actual data, that appropriately compensates Blue Ridge for the costs associated with Charter's attachments to its poles; and (iii) approve the terms and conditions Blue Ridge has submitted to govern Charter's attachments to Blue Ridge's poles.

This the 4th day of April, 2018.

/s/ Debbie W. Harden

Debbie W. Harden (NC Bar # 10576)
Matthew F. Tilley (NC Bar # 40125)
Womble Bond Dickinson (US) LLP
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037
Telephone: (704) 331-4943
Email: Debbie.harden@wbd-us.com
Email: matthew.tilley@wbd-us.com

ATTORNEYS FOR BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION

CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing **Petitioner Blue Ridge Electric Membership Corporation's Post-Hearing Brief** upon the parties of record in this proceeding, or their attorneys, by electronic mail as follows:

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

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

This 4th day of April, 2018.

/s/ Debbie W. Harden
Debbie W. Harden