PUBLIC VERSION

BEFORE THE STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-23, SUB 50

BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION Petitioner, v. CHARTER COMMUNICATIONS PROPERTIES, LLC, Respondent.	)	**POST HEARING BRIEF OF CHARTER COMMUNICATIONS PROPERTIES, LLC**

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Respondent-Petitioner Charter Communications Properties, LLC ("Charter") submits this Post-Hearing Brief in the above-captioned proceeding.[1]

PRELIMINARY STATEMENT

This is the fifth case to come before the Commission under the exclusive jurisdiction provided in the General Assembly's 2015 amendments to G.S. 62-350. Counting two prior cases decided by the North Carolina Business Court, this is the seventh case that requires the tribunal – in this case, the Commission – to determine just and reasonable rates, terms, and conditions for a communications services provider to attach its facilities to the utility poles owned by a municipal utility or electric membership corporation.

In all six of the prior cases under G.S. 62-350, the Business Court or the Commission found that the Federal Communications Commission ("FCC") rate formula adopted pursuant to 47 U.S.C. § 224(d) is just and reasonable, and the appropriate methodology for calculating pole attachment rates.[2] And in the four prior cases before the Commission raising issues related to pole attachment contractual terms and conditions, the Commission looked to industry standard provisions in agreements

[1] Pursuant to the Commission's Order, Charter is also submitting a Proposed Order in this proceeding. The Proposed Order contains additional facts and arguments that are incorporated in this brief by reference.

[2] *Time Warner Entertainment—Advance/Newhouse P'ship v. Town of Landis*, No. 10-CVS-1172, 2014 WL 2921723 (N.C. Sup. Ct. Jun. 24, 2014) ("*Landis*"); *Rutherford Elec. Membership Corp. v. Time Warner Entertainment—Advance/Newhouse*, No. 13-CVS-231, 2014 WL 2159382 (N.C. Super. Ct. May 22, 2014), *aff'd,* 771 S.E.2d 768 (N.C. Ct. App. 2015) ("*Rutherford*"); *Time Warner Cable Southeast LLC v. Jones-Onslow EMC*, Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-43, Sub 88 (NCUC Jan. 9, 2018) ("*JOEMC Order*"); *Time Warner Cable Southeast LLC v. Surry-Yadkin EMC*, Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-49, Sub 55 (NCUC Jan. 9, 2018) ("*SYEMC Order*"); *Time Warner Cable Southeast LLC v. Carteret-Craven EMC*, Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-55, Sub 70 (NCUC Jan. 9, 2018) ("*CCEMC Order*"); *Union EMC v. Time Warner Cable Southeast LLC*, Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-39, Sub 44 (NCUC Jan. 9, 2018) ("*UEMC Order*").

negotiated in both regulated and unregulated situations as persuasive evidence of reasonableness.

The record in this case presents no reason for the Commission to deviate from its established, consistent, and well-reasoned precedent. The parties here rely on the same experts as in the prior four cases resolved by the Commission, advocate for the same two – and only two – competing rate proposals, and have submitted similar evidence in support of their respective positions. To be sure, the evidence here begs the Commission to reinforce and refine its prior orders, including with respect to the use of presumptions in calculating rates under the FCC methodology, and G.S. 62-350's nondiscrimination requirements.

Rates. As the Commission has found, the FCC rate formula urged by Charter in this proceeding yields a just and reasonable rate under G.S. 62-350. *JOEMC Order* at 20, FOF 19.[3] The FCC rate methodology is "consistent with the general approach to cost allocation recognized and applied by the Commission as a foundation of its regulatory approach to setting rates, which seeks to allocate costs based on practical, observable or logical links to cost causation." *Id.* at 37. And that approach "is longstanding, well-understood, widely applied, and judicially approved." *Id.* at 46. It has been approved by this Commission in four separate cases, accepted by the North Carolina Business Court, and affirmed by the North Carolina Court of Appeals. It is amply supported by the record in this case, which establishes:

[3] For general propositions supported by all four Commission orders arising under Section 62-350, Charter provides a representative cite to the JOEMC Order, unless specifically indicated otherwise.

- The FCC methodology requires the communications services provider to pay upfront all direct and verifiable "but for" costs that are incurred by the pole owner solely to provide pole attachment service.
- The FCC methodology imposes on the communications services provider that share of the fully allocated costs of the entire pole represented by the proportion of the pole's "usable space" occupied by its attachment.
- The FCC methodology is supported by expert economic testimony, and is similar to how a functioning free market would distribute pole costs.
- The FCC methodology mirrors standard methods used by this Commission to allocate common costs according to how direct costs are incurred and allocated.
- The FCC methodology yields predictable and fully-compensatory rates in line with other utilities in the state.
- The FCC methodology has been adopted in public proceedings and is used in 46 states to regulate the pole rates of IOUs and ILECs, including in North Carolina.
- The FCC methodology is endorsed – and recommended for use in regulating attachments to cooperative poles – by the National Association of Regulatory Utility Commissioners ("NARUC") and the National Association of State Utility Consumer Advocates ("NASUCA"). Even the national lobbying association for cooperatives, the National Rural Electric Cooperative Association ("NRECA"), recognizes that the FCC rate method is "unimpeachable" and the most widely accepted methodology.

- The FCC methodology has been approved by numerous judicial decisions, including by the United States Supreme Court, as providing a fully compensatory rate.
- The FCC methodology was approved as just and reasonable by the North Carolina Business Court and was affirmed by the North Carolina Court of Appeals, and was recently approved by this Commission in four separate cases.

Application of the economically-supported, well-understood, and judicially-approved FCC rate methodology in this case would thus derive pole rates that are in the same range as pole attachment rates across the Nation and as charged by the IOUs and ILECs throughout this state. *See id.* at 46 ("Applying [the FCC rate] to cooperative pole owners would bring uniform treatment to most poles in the state.").

Like the four cooperatives in the prior cases to come before the Commission, and relying on the same experts and very similar testimony, Blue Ridge Electric Membership Corporation ("Blue Ridge" or the "Cooperative") advocates for the approach adopted by the Tennessee Valley Authority ("TVA") for application to its wholesale electric power distributors.[4] Blue Ridge has offered no evidence – and certainly no economic testimony – that could change the Commission's conclusion that the TVA approach uses an "arbitrary allocation of costs" and is "without any basis in economic theory." *Id.* at 37, 46. Unable to offer a principled basis for the TVA approach grounded in cost causation – because none exists – Blue Ridge simply continues to extoll "the pure

[4] TVA produces electric power and enters into contracts with local power distributors who act as retailers of TVA power to ultimate business and residential customers. TVA has broad statutory authority in determining issues related to its customers' retail rates. It is these distribution entities whose pole attachment rates are controlled by TVA's 2016 pole attachment rate resolution.

numerical convenience" of the TVA approach. *Id.* at 37. The record establishes familiar and incurable deficiencies of the TVA approach:

- The TVA method is based on TVA's understanding that pole attachment revenues are used to offset the need for higher electric rates and that its controlling statute requires that it keep retail electric rates as low as feasible.
- The TVA method was adopted in a closed proceeding that did not include participation by any members of the public except TVA's wholesale electric customers that own distribution poles, and their trade association.
- The TVA method is based on the assumption that all parties that attach to the pole make equal use of the pole's "unusable" (common) space, without any recognition that third-party communications providers like Charter actually have only limited, conditional and temporary rights to attach. Charter has to pay to create attachment space that is not otherwise present, and can be displaced by the pole owner at any time.
- The TVA method is not used by any other administrative agency – state or federal – in regulating pole attachment rates and has not been reviewed by any court.[5]
- The TVA method is based on clear factual errors, including TVA's failure to understand that (i) the FCC method (which TVA rejected) shares all of

[5] Whether TVA's rates will ultimately be approved in court is questionable. Although TVA has broad authority to control the retail electric rates of its wholesale customers, that authority has never been extended to pole attachment rates, and TVA's exclusionary decision-making process violated the requirements of the Administrative Procedure Act. Further, TVA's allocation of the safety space to the communications provider has no factual support.

the pole's costs with third party attachers and (ii) the "safety space" found on a typical pole can be, and is, used by the pole owners for revenue generating facilities.

- The TVA method is not supported in the record here (or at TVA) by any expert economic analysis or testimony.
- The TVA method, which shares costs based on the number of third parties that use the poles, can result in rates doubling simply based on the number of third party attachers, even when the costs do not vary.

But even TVA's arbitrary allocation of 28 percent of the pole costs to the communications services provider was not sufficient, by itself, to justify Blue Ridge's astonishingly high $26.64 rate. To justify that rate, Blue Ridge selectively attempted to rebut presumptive inputs so as to yield a higher rate under the TVA approach, ultimately seeking to allocate more than 41 percent of all pole costs to Charter. But the Cooperative's manipulations went far beyond any existing TVA guidance, and were not consistent with the FCC's rules for rebutting presumptions. The Commission should thus confirm that Blue Ridge's efforts to rebut the presumptions cannot be used in the FCC rate methodology because it failed to follow and comply with applicable FCC precedent.

Because Blue Ridge's attempt to justify its rate finds no support in the governing statute or the record, Charter asks the Commission to conclude that the Cooperative's rates far exceed any measure of reasonableness.

Terms and Conditions. As the Commission is aware, the FCC also has regulated the pole attachment terms and conditions of IOUs and ILECs in North Carolina and throughout much of the country for decades. *See id.* at 22. Adding to this robust

precedent, the Commission itself resolved a number of issues related to pole attachment terms and conditions in the four prior cases that have come before it, including many of the same matters at issue in this case. *See, e.g., id.* at 52-79. Both the FCC's regulation and this Commission's prior orders have been informed largely by industry-standard terms and conditions common to all types of pole owners and attaching entities. Application of these well-established, operationally sound, and mutually beneficial terms and conditions "reflect[] an unbiased resolution of the issues," *id.* at 52, and would ensure safe and consistent standards across the state, while also minimizing the potential for further disputes and disruptions.

But Blue Ridge urges the Commission to reject these widely-accepted and industry-standard provisions in favor of discriminatory and unilateral terms the Cooperative has imposed on Charter – and only Charter – by virtue of Blue Ridge's monopoly ownership and control of the essential pole facilities. And Blue Ridge, like the cooperatives in the prior cases, again asks the Commission to reject terms similar to those its own expert developed at a time when cooperatives were unregulated. Blue Ridge even seeks terms more onerous than those it imposed when it was unregulated, and which are not called for by accepted safety requirements or guidelines. But the Cooperative has not presented any evidence that conditions have changed or facts exist that warrant the onerous and aberrant terms it seeks to impose, let alone that it should be entitled to continue to impose those terms only on Charter but not its competitors.

Taken together, the rates, terms and conditions Blue Ridge seeks appear intended improperly to punish and/or prevent Charter from exercising its statutory right to access the Cooperative's poles, and thus should be rejected. That result is called for by the

governing statute and the sound policy informing it, the record in the hearings, longstanding economic and rate regulation principles, accepted industry-standard practices, and common sense.

BACKGROUND

I. REGULATORY BACKGROUND.

When the North Carolina General Assembly adopted G.S. 62-350 in 2009, it joined numerous other states in establishing regulatory control over escalating pole attachment rates charged by cooperatives and municipal utilities for access to their monopoly-owned, essential facilities.

Prior to G.S. 62-350, nothing constrained the pole attachment rates and terms municipal and cooperative utilities could demand from communications services providers. That is because no properly functioning competitive "market" existed or currently exists for pole attachments. Owing to economic, environmental, zoning, and rights-of-way restrictions, cable operators like Charter do not have any practical, economical alternative to relying on existing pole facilities to support their communications networks.[6] The United States Supreme Court has recognized that "[c]able operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable . . . and [u]tility companies' poles provide . . . virtually the only practical medium for installation of television cables." *FCC v. Florida Power*

[6] *See e.g.*, Kravtin, Tr. Vol. 4, pp. 174-175; Mullins, Tr. Vol. 3, p. 227; *see also Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.,* 346 F.3d 1033, 1036 (11th Cir. 2003) (noting "lack of alternatives to these existing poles"); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) (noting utilities are "the owner of . . . 'essential' facilities" for cable operators); *Southern Co. v. FCC.*, 293 F.3d 1338, 1341 (11th Cir. 2002) ("As a practical matter, cable companies have had little choice but to" attach "their distribution cable to utility poles owned and maintained by power and telephone companies."); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 576-77 (D.C. Cir. 2002) ("Since building new poles was prohibitively expensive, cable operators instead leased existing space from utilities.").

Corp., 480 U.S. 245, 247 (1987). This is particularly true for Charter's existing aerial infrastructure, as it would be prohibitively expensive – totaling more than $56 million – for Charter to rebuild its aerial network in Blue Ridge's territory underground.[7] Poles are thus an essential facility for cable operators over which utilities (whether investor-owned, municipally-owned, or cooperatively-owned) exert monopoly control.[8]

The monopoly impulses of investor-owned utilities ("IOUs") and incumbent local exchange companies ("ILECs") in North Carolina and across the Nation have long been checked by the federal Pole Attachment Act and the FCC's oversight and enforcement.[9] Congress chose to exempt municipal and cooperative utilities from federal oversight because, when the Act was enacted in 1978, the rates charged by these utilities were low and reasonable – typically in the range of a few dollars – and were expected to remain that way. S. Rep. No. 95-580, at 16-18 (1977).

That prediction remained true for some utilities and for a time. But, as this case and the ones recently before it demonstrate, some cooperatively organized utilities have, in the absence of effective regulation, moved to impose rapidly escalating monopoly rates on communications providers. Blue Ridge, for example, has imposed on Charter a rate many times higher than the FCC rate for more than a decade, when it was free from any sort of regulation or market constraint.[10] Carteret-Craven EMC also adopted excessive rates more than a decade ago. But when Time Warner Cable sought judicial relief from

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[7] *See* Mullins, Tr. Vol. 3, pp. 223, 227-228.
[8] Kravtin, Tr. Vol. 4, pp. 167-68.
[9] Congress allowed states to displace the FCC's jurisdiction with their own pole attachment regulation. 47 U.S.C. § 224(c). Twenty-one states (including the District of Columbia) have done so. *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 25 FCC Rcd 5541, 5541-42 (2010).
[10] Martin, Tr. Vol. 4, p. 77; MM Ex. 1 (Ex. C, Schedule of Fees, indicating annual rate in excess of $23.00 per pole beginning in 2008).

those excessive rates under North Carolina common law, the United States Fourth Circuit Court of Appeals concluded in 2007 that "if any regulation or compulsion is to be applied to pole-attachment agreements, it should be done by the North Carolina legislature, the North Carolina Utilities Commission, [or] the North Carolina state courts." *Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 315 (4th Cir. 2007).

The North Carolina General Assembly responded by enacting G.S. 62-350 in 2009 to close this regulatory gap. G.S. 62-350 "establish[es] several judicially-enforceable statutory rights" that curtail municipal and cooperative utilities' monopoly impulses. The statute enshrines communications services providers' rights to "utilize" poles owned by cooperatives and municipal utilities at "just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements." GS 62-350(a); *JOEMC Order* at 2. The "legislative intent behind that statute" is clear: It "*endorses regulatory intervention to promote 'just and reasonable rates*.' " *Time Warner Entertainment-Advance/ Newhouse P'ship v. Town of Landis*, 747 S.E.2d 610, 615 (2013) (emphasis added). And, as the Commission has recognized, the purpose of pole attachment regulation "is to control the natural incentive for monopoly owners of essential facilities to overcharge." *JOEMC Order* at 44-45.[11] The statute was thus intended to constrain excessive rates like those charged by Blue Ridge, Carteret-Craven, and other cooperatives.

[11] Blue Ridge has offered no evidence of any "different objective on the part of the General Assembly in passing and amending G.S. 62-350." *Id.*

II. FACTS.

Charter, a communications services provider offering video, broadband access, and digital phone service, has for many years attached to utility poles owned by Blue Ridge to serve subscribers within its franchise areas.[12] Charter executed its most recent pole attachment agreement with Blue Ridge in 2008, prior to the adoption of G.S. 62-350.[13]

Charter is a licensee under its pole attachment agreement with Blue Ridge. Charter is entitled under its agreement to temporarily and conditionally occupy pole space that is otherwise available and not required by the Cooperative.[14] Blue Ridge is not obligated to install or maintain poles with sufficient space to accommodate Charter's attachments.[15] If the current configuration of the pole will not accommodate Charter's attachment consistent with the requirements of the National Electrical Safety Code ("NESC"), then Charter must pay to create space for its attachment.[16] This could mean paying to rearrange the existing facilities on the pole.[17] Or it could require Charter to pay for a taller or stronger pole, including all of the costs incurred to install the pole and transfer the existing facilities to it.[18] Even where Charter has paid to install a taller and stronger pole, the pole is owned by the Cooperative. Charter has no ownership rights, and Charter must continue to pay rent for its attachment.[19] Charter's attachments to Blue Ridge poles are also contingent on the Cooperative's right at any time to "reclaim" the

[12] *See* Martin, Tr. Vol 4, p. 74; Mullins, Tr. Vol. 3, p. 227; *see also* Jt. Stip. ¶ 2.
[13] Jt. Stip. ¶ 6.
[14] *See* Martin, Tr. Vol. 4, p. 141, Mullins, Tr. Vol. 3, p. 224; MM Ex. 1, Art. 1; Kravtin, Tr. Vol. 4, pp. 198-99, n.38.
[15] *See* Mullins, Tr. Vol. 3, p. 224; MM Ex. 1, Art. 1.4; Layton, Tr. Vol. 1, p. 140.
[16] Mullins, Tr. Vol. 3, pp. 224, 231-32.
[17] *Id.*
[18] *Id.*
[19] *Id.*

space used by Charter's attachment to accommodate the Cooperative's electric service.[20] These terms are typical of all pole attachment agreements, and Charter is willing to accept similar terms in a new agreement with Blue Ridge.[21]

The physical characteristics of Charter's attachments are not in dispute. Where surplus space is available (or where Charter pays to create it), Charter affixes its attachment to the pole at approximately 18 to 21 feet above the ground using a through-bolt that holds a bracket supporting its stainless steel strand.[22] Charter's wires are lashed to the strand.[23] Even though Charter's physical attachment occupies only about an inch of pole space, its agreement with Blue Ridge (and other cooperatives) allocates one foot of space on the pole to Charter.[24] Communications facilities are typically separated from the Cooperative's neutral wire by a 40 inch "safety space," but Charter currently spaces its new attachments 72 inches below the neutral wire, where feasible, based on the 2008 agreement.[25] Most other third-party attachers, including all of the telephone companies that compete directly with Charter, are not required to space their attachments 72 inches from Blue Ridge's neutral.[26] Charter is prohibited by the NESC from placing facilities in the 40-inch safety space. Blue Ridge, however, can use – and does use – the safety space to attach revenue-generating streetlights and other facilities.[27] The Cooperative is also allowed by the NESC to use this space for its own communications facilities.[28]

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[20] *Id.* at p. 232, MM Ex. 1.
[21] *Id.*
[22] *Id.* at p. 231.
[23] *Id.*
[24] *Id.* at p. 224.
[25] *Id.* at pp. 231, 245.
[26] *Id.* at p. 242; Layton, Tr. Vol. 1, p. 165.
[27] Mullins, Tr. Vol. 3, pp. 245-50; MM Ex. 16 at 32-36.
[28] Mullins, Tr. Vol. 3, p. 246; Layton, Tr. Vol. 1, pp. 121-23.

Although joint use agreements among electric and telephone company pole owners typically result in only a single pole line on any road, that pole line is often made up of telephone company poles (and sometimes IOU poles) interspersed among or adjacent to the Cooperative's poles.[29] The poles owned by IOUs, ILECs, and Blue Ridge are virtually identical in make up and appearance, and typically can be distinguished from each other only by their pole identification tags.[30] Likewise, Charter's facilities and methods of attachment are the same no matter the pole owner.[31]

Blue Ridge's pole attachment rate from 2015 to the present – $26.64 – is several multiples of the rates that Charter has been required to pay over the same period to FCC-regulated IOUs and ILECs in North Carolina. The highest average rate Charter has paid to IOUs in North Carolina since 2015 is $7.26 in 2017.[32] The highest average rate Charter has paid to ILECs in North Carolina since 2015 is $3.38 in 2015.[33] Blue Ridge charges Charter the highest rate of all of its pole attachers.[34]

Both parties in this proceeding used the same utility accounts to determine the average net cost of a utility pole owned and maintained by Blue Ridge. Charter's rate calculations relied on FCC presumptions (which are also used by TVA) for average pole height (37.5 feet long), burial depth (6 feet), and minimum grade for clearance over roads (18 feet).[35] Charter also relied on the presumptions for "unusable" or "common" space (24 feet) and "usable" space (13.5 feet), as well as a presumption that 15% of the distribution pole investment account (Account 364) consists of appurtenances such as

[29] Martin, Tr. Vol. 4, p. 77; Mullins, Tr. Vol. 3, pp. 235-36.
[30] Mullins, Tr. Vol. 3, pp. 235-36.
[31] *Id.*
[32] Martin, Tr. Vol. 4, p. 81.
[33] *Id.*
[34] Mullins, Tr. Vol. 3, p. 240-41.
[35] Kravtin, Tr. Vol. 4, pp. 186-88, 210.

cross-arms and other equipment not used by or useful to a third-party attacher.[36] These presumptions streamline and simplify the pole attachment rate calculation, ease record-keeping requirements, and reduce the likelihood of factual disputes. Relying on these presumptions would not, however, justify Blue Ridge's current rate, even when they are used as inputs in the arbitrary TVA method. As a result, the Cooperative has attempted to rebut the presumptions for average pole height (offering 36.87 feet), unusable space (offering 27.26 feet), and usable space (offering 9.61 feet, as the difference between 36.87 feet and 27.26 feet).[37] Blue Ridge also asserted that the percentage of its pole investment account consisting of "appurtenances" is 12.59 percent, rather than the presumed 15 percent.[38]

ARGUMENT

The General Assembly adopted Section 62-350 to check skyrocketing pole attachment rate increases and onerous and unreasonable terms and conditions of attachment imposed by unregulated municipal and cooperative utilities on communications attachers. If the General Assembly intended to allow unregulated utilities to continue to impose exorbitant rates and oppressive terms and conditions – such as those Blue Ridge proposes here – it would have had no reason to enact a new statute, as the status quo already gave Blue Ridge that opportunity. *See Time Warner Entertainment-Advance/ Newhouse P'ship*, 506 F.3d at 315 (stating "if any regulation or compulsion is to be applied to pole-attachment agreements," it would need to come from the General Assembly, the North Carolina courts, or this Commission.). As the

[36] *Id.*
[37] Arnett, Tr. Vol. 2, pp. 61-65, 187-88.
[38] *Id.* at pp. 61-62.

Commission has found, the purpose of pole attachment regulation like G.S. 62-350 is to prevent monopoly owners of essential facilities from overcharging, particularly where it harms the public interest. *JOEMC Order* at 43-46.[39]

The question for the Commission to resolve in this case, therefore, is what is a just and reasonable constraint on Blue Ridge's pole attachment rates, terms, and conditions under G.S. 62-350? The answer, Charter respectfully submits, is obvious on the record here, and wholly consistent with the Commission's prior rulings. Charter urges the Commission to adopt the economically justified and fully compensatory rate methodology used by the FCC and almost every other regulator with jurisdiction over pole attachments. The Commission and courts in this state consistently have approved that methodology as just and reasonable when applied to municipal and cooperatively owned poles. And the FCC rate methodology is already applicable to most of the poles in the state, including poles owned by other cooperatives. This case also presents an opportunity for the Commission to clarify that Blue Ridge must follow the FCC's requirements for rebutting the FCC's presumptive inputs, not the biased and self-serving machinations developed by its expert. Charter further urges the Commission to approve the industry-standard pole attachment terms and conditions proposed by Charter and

[39] Nor could the General Assembly's 2015 revisions be construed to authorize rate increases for cooperatives, or legislative disapproval of the FCC rate methodology. The legislature specified that, "[n]otwithstanding the deletion of language referencing the factors or evidence that may be presented by a party in Section 2 of this act [specifically, the reference to section 224 of the Communications Act of 1934], the Commission may consider any evidence presented by a party, including any methodologies previously applied." Kravtin, Tr. Vol. 5, pp. 113-15; Charter Kravtin Redirect Ex. 1 (N.C. Session Law 2015-119 (2015), at § 7). The only other "methodolog[y] previously applied" to cooperatives in North Carolina is the FCC rate, which the Business Court found was the only reasonable rate methodology proffered by the parties in the *Rutherford* case. *Id.* Statements by the bill sponsors further confirm that they intended the Commission to consider the FCC rate methodology, if presented by a party in a case-by-case adjudication.

allowed by the majority of the state's utilities, and require that these terms and conditions be implemented and applied in a non-discriminatory manner.

On the other hand, Blue Ridge seeks to use a statute designed to constrain pole-attachment abuses to gain the Commission's blessing for its excessive rates – which even the arbitrary TVA approach cannot justify with default presumptions – as well as oppressive and impractical terms and conditions that find no support in industry practice or the pole attachment agreements in the record. The Commission should find that the FCC rate formula and the industry-standard terms and conditions proposed by Charter are just and reasonable under Section 62-350.

I. THE RECORD EVIDENCE DEMONSTRATES THAT THE FCC METHODOLOGY YIELDS FULLY COMPENSATORY, JUST AND REASONABLE POLE ATTACHMENT RATES.

A. The FCC Methodology Is The Only Approach In The Record Supported By Expert Economic Analysis.

Charter's economist expert, Patricia Kravtin, was the only economist to provide testimony in this proceeding. Ms. Kravtin testified that the "primary purpose of pole attachment regulation" is to "protect[] cable operators and other communications attachers against potential abuse by pole-owning utilities that control access to a vital input of production needed by those attachers."[40] Excessively high pole attachment rates, she explained, ultimately result in higher prices for communications services, distort that market, and discourage investment (particularly in rural areas).[41]

To avoid these problems, Ms. Kravtin testified that the Commission should determine just and reasonable pole attachment rates using the FCC rate methodology.

[40] Kravtin, Tr. Vol. 4, p. 174.
[41] *Id.* at pp. 174-76.

She explained that the FCC's fully allocated rate "substantially exceeds the true marginal costs of pole attachments, which, on a recurring basis, are exceedingly small" – on the order of $1.00 per pole.[42] The FCC rate approach "allocates to an attacher its fair, just and reasonable proportionate share of the *full* set of ongoing utility and operating and capital costs (including a return on capital) associated with the *entire* pole."[43] Because it uses a fully allocated cost approach, the FCC rate method recovers costs that would exist for the utility *even in the absence of the third-party attacher*.

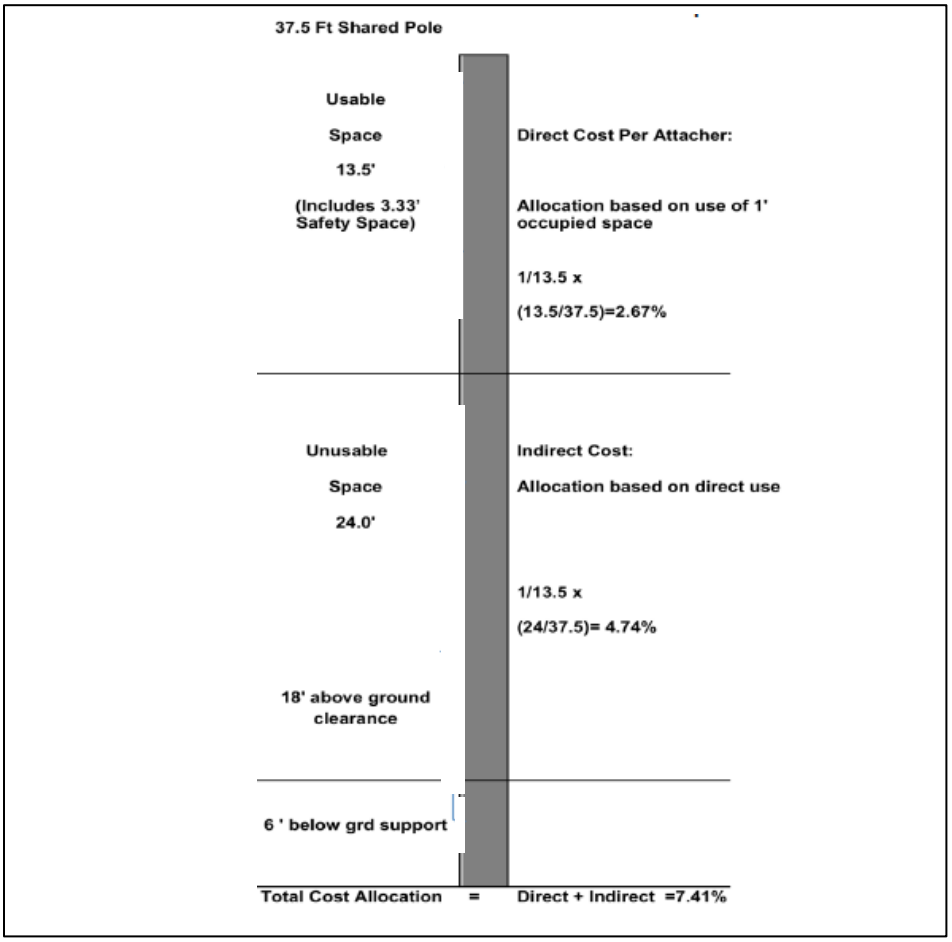
The FCC rate formula calculates the maximum pole attachment rate based on the actual costs of owning and maintaining a pole, allocating to the attaching party its proportionate share of those costs.[44] Most of the cost inputs to the FCC's formula are not in dispute in this case. The only cost input in dispute is the appropriate percentage of costs to subtract out of Blue Ridge's pole investment account to remove appurtenances such as cross arms and other hardware that are not used by and do not benefit third party attachers. Ms. Kravtin proposed to use the FCC's presumptive 15 percent appurtenance reduction for Blue Ridge,[45] consistent with her recommendation to use the same presumption in the prior four cases. *See JOEMC Order* at 27.

The FCC's "proportionate" allocation assigns to the communications attacher the percentage of the annual cost of the entire pole represented by the percentage of the space "usable" for the attachment of revenue-generating facilities that is occupied by the attacher's attachment. Presuming that the communications attachment occupies one foot of the 13.5 feet of space that is "usable" for attachments, the FCC allocates 1/13.5 (or

[42] *Id.* at p. 185.
[43] *Id.* at p. 185-86 (emphasis in original).
[44] *Id.* at p. 186.
[45] *Id.* at p. 188.

7.41 percent) of the costs of the entire pole to the communications attacher.[46] Like this Commission, the FCC recognizes that the "safety space" is used by the pole owner for revenue-generating purposes, and the FCC treats this space as part of the pole's "usable space."[47] The communications attacher thus pays 7.41 percent of the cost of the unusable space and the safety space, as well as 7.41 percent of the cost of the remainder of the usable space.[48] The FCC method is depicted in Figure 1 below.

FIGURE 1[49]



[46] *Id.* at pp. 186-87.
[47] *Id.* at pp. 209-10; *JOEMC Order* at 38-39; *see also Amendment of Rules and Policies Governing Pole Attachments*, Report & Order, 15 FCC Rcd 6453, 6467 ¶ 22 (2000) ("*2000 Fee Order*") ("The [safety] space is usable and is used by the electric utilities.").
[48] Kravtin, Tr. Vol. 4, pp. 186-87.
[49] PDK Ex. 9.

Opponents of the FCC rate method often assert, incorrectly, that it does not charge for the cost of the pole's unusable space. This is simply not true. The FCC emphatically rejected this already-tired argument nearly twenty years ago: "[C]laims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the [FCC's] rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation." *Alabama Cable Telecomm's Ass'n. v. Alabama Power Co.*, 16 FCC Rcd 12209, 12236, ¶ 60 (2001). This Commission has correctly accepted that the FCC rate formula allocates the entire cost of the pole, including the unusable space. *See JOEMC Order* at 32, 36-40.

The FCC's allocation of pole costs is grounded in sound economic policy. The FCC allocation of "the annual costs of maintaining a pole based on the percentage of the usable and revenue-generating space occupied by the attachment is supported by well-recognized cost-causation principles." *Id.* at 36. "This approach is consistent with the general approach to cost allocation recognized and applied by the Commission as a foundation of its regulatory approach to setting rates, which seeks to allocate costs based on practical, observable or logical links to cost-causation." *Id.* at 37.[50] In this manner, the FCC rate formula aligns the cost allocator to the actual exclusion of "another attachment from being made in that usable space."[51] As Ms. Kravtin explained, "as an economic matter, the costs associated with space on the pole do *not* vary according to the

[50] *See also* Kravtin, Tr. Vol. 4, pp. 189-95.
[51] *Id.* at p. 190.

number of attaching entities but rather to the economic utilization of pole capacity."[52] The FCC methodology assigns costs according to each user's economic utilization of pole capacity.

The FCC rate methodology's grounding in practical, observable or logical links to cost-causation principles is consistent with the general approach applied by both the FCC[53] and "with previous decisions of the Commission in analogous circumstances." *JOEMC Order* at 36.[54] The FCC approach is the "same as one would expect in a competitive real estate market where the costs of common space in a building are allocated on the basis of the number of apartments or floors occupied by each tenant, rather than simply based on a per-capita allocation." *Id.*[55] It is also similar to "how you would allocate the common costs of a factory production system (the costs of the building, conveyor belts and so on) based on the direct costs of the different product lines, not simply by dividing the common costs by the number of product lines." *Id.* These analogies are apt in this case, because, as in the other four cases decided by the Commission, Charter uses only one foot of usable space on a pole, compared to Blue Ridge's right to use as much space as its needs. Moreover, Charter can be forced to move to a different location on the pole or to leave a pole

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[52] *Id*. at pp. 194-95.

[53] *See, e.g.*, Commission Rule R9-2 (adopting FCC Uniform System of Accounts for telephone companies; requiring submission of cost allocation plans); Rule R8-27 (adopting FERC Uniform System of Accounts for electric utilities); Rule R19-1 (requiring Electric Membership Corporations to file cost allocation manuals updated within 30 days of any significant change).

[54] *See Order Addressing Collocation Issues,* Docket No. P-100, Sub 133j (Dec. 28, 2001), at 273 (concluding in a proceeding involving competitive access to incumbent telephone company central office facilities that "it is appropriate to allocate security costs to carriers based on square footage occupied in the central office as a recurring charge," rejecting the arguments of BellSouth and Verizon to allocate the costs on a pro-rata basis among the occupants of the property) ("Collocation Order"), *motion for recon. denied, Order Addressing Motions for Reconsideration and Clarification,* Docket No. P-100, Sub 133j (Aug. 20, 2002), at 118 ("[T]he Commission finds it appropriate to deny Verizon's Motion for Reconsideration and Clarification in this regard and affirm its original decision that security costs should be allocated based on square footage occupied in the central office.")..

[55] Kravtin, Tr. Vol. 4, p. 192-93.

altogether at any time if Blue Ridge needs the space on the pole for its electric service, all at Charter's expense.[56]

The FCC rate methodology ultimately assures that the utility and its customers are better off as a result of the pole attachment because it sets the maximum rate using a fully allocated approach.[57] As the evidence shows here, Charter reduces Blue Ridge's overall costs of pole ownership by paying to attach at a rate above the incremental costs the Cooperative incurs in connection with Charter's attachments.[58] Charter's pole attachment agreement with Blue Ridge, in fact, already requires Charter to pay the Cooperative's direct "but for" incremental costs, separate from and in addition to the annual recurring rate. For example, it requires Charter to pay the costs of pole inspections and audits of its attachments, and any make-ready expenses (including post-inspection reviews).[59] When Charter pays to create surplus space where it does not already exist through the make-ready process, it further benefits Blue Ridge and its members by paying for a new, taller and stronger pole that enhances its network.[60] And while the Cooperative asserts that it incurs unrecovered costs as a result of Charter's attachments, it nowhere quantifies those costs. Nor has it submitted any evidence indicating whether, and to what extent, those costs would not be recovered by Charter's direct payments and the FCC's fully allocated methodology. The FCC rate thus recovers far more than the Cooperative's marginal costs of providing space for Charter's attachments, and does not include any subsidy flowing from Blue Ridge to Charter.[61]

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[56] *Id.* at pp. 199-200.
[57] *Rutherford*, 2014 WL 2159382 at *9.
[58] Kravtin, Tr. Vol. 4, pp. 207-08.
[59] Martin, Tr. Vol. 4, pp. 84-85; Kravtin, Tr. Vol. 4, p. 199 & n.38.
[60] Kravtin, Tr. Vol. 4, p. 199 & n.38.
[61] *Id.* at pp. 196-97, 206-07. Ms. Kravtin explained that as an economic term a "subsidy" is present only when a rate does not cover marginal costs, defined as the additional costs that would not exist but for the

B. The FCC's Approach Is A Well-Established, Consistent, Predictable, And Judicially-Approved Methodology For Evaluating Pole Attachment Rates.

The Commission may rely on the FCC's methodology with the knowledge that it is relying on a settled framework established by the federal regulator charged with ensuring just and reasonable pole attachment rates. The FCC issued its first Report and Order addressing pole attachment rates in 1978. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report & Order, 68 FCC 2d 1585 (1978). Over the ensuing decades, the FCC has issued scores of decisions clarifying, refining and updating its approach[62] and resolving disputes over its implementation,[63] most recently affirming it in 2018 in *Restoring Internet Freedom*, WC No. 17-108, Declaratory Ruling, Report & Order, 2018 WL 305638, ¶¶ 185-91 (FCC 2018).

The FCC rate has been consistently affirmed and approved by courts. Since 1981, federal courts have issued more than a dozen opinions on review of FCC orders and decisions.[64] Courts, including the U.S. Supreme Court and the North Carolina courts,

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product sold. "It is a central and well-established tenet of economics that rates that recover the marginal costs of production are economically efficient and subsidy-free." *Id.* at p. 197, n.35.

[62] *See, e.g.*, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion & Second Report & Order, 72 FCC 2d 59 (1979); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion & Order, 77 FCC 2d 187 (1980); *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report & Order, 2 FCC Rcd 4387 (1987); *aff'd, Memorandum Opinion & Order on Reconsideration*, 4 FCC Rcd 468 (1989); *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, 26 FCC Rcd 5240 (2011), *aff'd sub nom. Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) ("*2011 Pole Attachment Order*").

[63] *See, e.g.*, *Panhandle TV v. Potomac Edison Co.*, PA 83-0019, PA 83-0021, PA 83-0025, 1984 FCC LEXIS 2131 (Aug. 10, 1984); *American Television & Commc'ns Corp. v. Wisconsin Power & Light Co.*, PA 82-0066, PA 82-0077, 1985 FCC LEXIS 4136 (Dec. 31, 1984); *Group W. Cable v. Wisconsin Elec. Power Co.*, PA 92-0062, 82-0071, 82-0070, 1985 FCC LEXIS 3476 (Apr. 9, 1985); *Continental Cablevision of New Hampshire, Inc. v. Concord Elec. Co.*, PA 82-0074, 1985 FCC LEXIS 3023, (June 28, 1985).

[64] *See, e.g.*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (upholding FCC orders promulgating rules and policies for rate regulation under the Act, in particular the determinations regarding usable space, rate methodology, and prospective application to all attachments); *Alabama Power v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (vacating FCC modification of pole attachment agreement because FCC failed fairly and accurately to calculate maximum allowable rate); *Texas Power & Light Co. v. FCC*, 784

have also repeatedly held that pole rates calculated under the FCC rate formula are fully compensatory and do not provide any subsidy to the cable operator.[65] In the *Rutherford* case, the Business Court found, based on the testimony of Ms. Kravtin and the evidence in that case, that "the FCC Cable Rate formula's allocation method, used to determine what percentage of the fully allocated costs to assign to the attaching party, provides an economically justified means of reasonably allocating costs." *Rutherford*, 2014 WL 2159382 at *9. The Court further held that, "far 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." *Id.* The North Carolina Court of Appeals unanimously affirmed the Business Court's decision. Notwithstanding the Cooperative's effort to re-litigate this point, it has been settled for decades and cannot be seriously contested now, particularly where Blue Ridge,

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F.2d 1265 (5th Cir. 1986) (holding FCC acted arbitrarily and capriciously by denying utility right to include deferred taxes in its tax base and that utility is entitled to include a component of its investment in private rights of way in its calculation of rates); *Florida Power*, 480 U.S. 245 (rejecting a claim that the Act violated Takings Clause); *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (affirming FCC's ability to prohibit utility from charging unregulated rate because the attachment was carrying non-video communications); *Gulf Power*, 534 U.S. 327 (holding attachments carrying commingled services, as well attachments providing wireless telecommunications, fall within the Act); *Southern Co.*, 293 F.3d 1338 (upholding FCC orders implementing the 1996 Amendments to the Act with regard to rules regarding reserve space, scope of third party access, and pole modification notices); *Alabama Power*, 311 F.3d 1357 (rejecting an as-applied Fifth Amendment challenge to FCC's rate methodology for pole attachments); *Southern Co.*, 313 F.3d 574 (affirming FCC orders implementing amendments to the Act; disputed orders assured telecommunications providers can obtain attachment space at just and reasonable rates); *Public Service Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003) (affirming FCC's modification of underlying agreement as a reasonable exercise of authority under the Act); *Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033 (rejecting Fifth Amendment challenge to FCC-imposed pole attachment rate); *Gulf Power Co. v. FCC*, 669 F.3d 320 (D.C. Cir. 2012) (plaintiff barred from pursuing Takings Claim by *Alabama Power;* FCC correctly applied *Alabama Power* to the instant case); *American Elec. Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (affirming FCC's 2011 Pole Attachment Order).

[65] *See, e.g.*, *Florida Power*, 480 U.S. 245 (rejecting a claim that the Act violates Takings Clause); *Alabama Power*, 311 F.3d 1357 (rejecting an as-applied Fifth Amendment challenge the Commission's rate methodology for pole attachments); *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999) (finding FCC methodology under the Act provides just compensation); *2011 Pole Attachment Order*, 26 FCC Rcd at 5322 ("We find no evidence in the record that supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates."); *Rutherford*, 2014 WL 2159382 at *17-18; *Landis II*, 2014 WL 2921723 at *9.

like the cooperatives before it, has not submitted any expert economic testimony or evidence that it works a subsidy.[66] *See Alabama Power*, 16 FCC Rcd at 12235 ("The Commission's cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation."); *see also Florida Power*, 480 U.S. at 254 (explaining that it cannot "seriously be argued, that a rate providing for the recovery of fully allocated cost . . . is confiscatory").

The pole attachment rates charged by IOUs and ILECs in 45 states are based directly on the FCC rate methodology or a close approximation of it.[67] Thirty states have chosen simply to allow the FCC directly to regulate the pole attachment rates charged by IOUs and ILECs. Fifteen states, including Ohio, New York, California, Michigan, and Kentucky, regulate IOU and ILEC pole attachment rates according to the FCC rate methodology or a close cousin.[68] Many have affirmed their approaches in recent years.[69] And 11 states regulate the pole attachment rates of cooperatives and/or municipal utilities according to the FCC rate methodology.[70] Even where states have modified the FCC methodology, they have done so circumspectly and based on the particularized evidence

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[66] *See* Arnett, Tr. Vol. 2, pp. 170-73; *see also JOEMC Order* at 35 (stating Witness Arnett did not "give any 'economics' based justification for his contention that the FCC rate results in JOEMC providing a subsidy to TWC.").

[67] Alaska Stat. §§ 42.05.311, 42.05.321, 42.05.990(5); Cal. Pub. Util. Code § 9510; CO. REV. STAT. § 38-5.5-108(1); KY. REV. STAT. ANN. §§ 278.040, 278.280(2), 279.210; Mich. Comp. Laws §§ 460.6g, 484.2361, 460.6(1); Mo. Rev. Stat. § 67.5104; N.Y. PUB. SERV. LAW § 119-a; OR. REV. STAT. §§ 757.270 – 290, 759.650 – 675, 757.276, 757.270(2); TEX. UTIL. CODE ANN. § 54.204; UTAH CODE ANN. §§ 54-4-13, 54-2-1(16); VT. STAT. ANN. tit. 30 §§ 201, 225, 226.

[68] *See* Kravtin, Tr. Vol. 4, pp. 183-84 & PDK Ex. 7.

[69] *2011 Pole Attachment Order*, 26 FCC Rcd at 5322 (2011); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, 2015 WL 7589371 (2015); *see also Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 ACC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 689 (2002); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision 98-10-058, 1998 Cal. PUC LEXIS 879 (1998); *Application of Consumers Power Co*., Case Nos. U-10741, U-10816, U-108211, Opinion and Order, 1997 Mich. PUC LEXIS 26 (1997); *Rulemaking to Amend Oregon Admin. Rules Relating to Safety and Attachment Standards*, 2001 Ore. PUC LEXIS 483 (2001).

[70] *See* Kravtin, Tr. Vol. 4, pp. 183-84 & PDK Ex. 7.

before them, because even minor changes to the approach can produce dramatic and uneconomic rate fluctuations.

North Carolina is one of the 30 states where IOU and ILEC pole attachment rates are regulated directly by the FCC.[71] The average IOU and ILEC rates in the state in 2017 were $7.26 for IOUs and $2.52 for ILECs.[72] These rates are in the same range as the rates Ms. Kravtin calculated for Blue Ridge under the FCC rate methodology.

This similarity in FCC rates across IOUs, ILECs, and Blue Ridge is not surprising because the poles owned by IOUs and ILECs are virtually indistinguishable from poles owned by the Cooperative.[73] ILEC poles are often interspersed with Blue Ridge poles on the same pole lines, which often adjoin IOU pole lines, and share the same physical characteristics, due in part to historic joint use agreements between ILECs on the one hand and cooperatives and IOUs on the other.[74] Charter's attachments to IOU, ILEC, and Blue Ridge poles are likewise indistinguishable: Charter uses the same hardware and equipment to attach the same wires and other facilities, no matter the pole owner.[75] Blue Ridge, in fact, introduced no evidence demonstrating any differences between its poles and poles owned by North Carolina IOUs – or the facilities Charter attaches to them – that would justify a significantly higher pole attachment rate for it as compared to the IOUs. Applying the FCC rate to Blue Ridge poles makes economic sense and will "bring uniform treatment to most poles in the state, avoiding in large part the anomaly of having

[71] Kravtin, Tr. Vol. 4, p. 172; Martin, Tr. Vol. 4, p. 80.
[72] Martin, Tr. Vol. 4, p. 81.
[73] *See supra* at p. 13 & n. 29; Mullins, Tr. Vol. 3, pp. 235-37.
[74] Mullins, Tr. Vol. 3, pp. 235-37.
[75] *See supra* at p. 13 & n. 29.

widely varying rates for virtually identical poles which are placed in a pole line side by side." *See JOEMC Order* at 46.[76]

National associations representing public utility commissioners, like this Commission, and the consumers of both cable and utility services also strongly endorse the FCC rate methodology.[77] NARUC recommends regulation of electric cooperatives using the FCC approach, reasoning that "[t]he necessity of providing [cooperatives] an exemption from pole attachment rules has diminished considerably," and "[i]slands of regulatory exception will only serve to segregate market development."[78] NASUCA – an organization representing consumer interests, including cable, telephone, and utility ratepayers – likewise strongly supports the FCC rate formula.[79] Even NRECA, the national electric cooperative trade association to which Blue Ridge and its expert looked for guidance, describes the FCC rate methodology as "unimpeachable."[80] In its own words: "The [FCC] rate formulas are sanctioned by the U.S. Congress, have been adopted by most of the states that regulate pole attachments and are the most widely accepted methodologies for calculating pole attachment rates. . . . The formulas produce a cost-based rate and, therefore, satisfy the federal tax law requirement that cooperatives operate on a cost basis."[81]

There is no need for the Commission to reinvent the wheel or depart from its prior orders under Section 62-350. By applying a rate formula that is economically justified,

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[76] *See* Kravtin, Tr. Vol. 4, pp. 195-96 (explaining that it makes no sense from an economic perspective to allow rates charged by different entities vary widely).
[77] *See* Kravtin, Tr. Vol. 4, pp. 204-05 & PDK Exs.11-13.
[78] Kravtin, Tr. Vol. 4, p. 205; PDK Ex. 11.
[79] Kravtin, Tr. Vol. 4, p. 205; PDK Ex. 13.
[80] *See* Kravtin, Tr. Vol. 4, p. 169; PDK Ex. 2, p. 5 ("Unregulated electric co-ops should consider the following advantages to using the FCC formulas to calculate pole attachment rates: If used according to FCC rules, the rates are unimpeachable.").
[81] PDK Ex. 2, p. 5.

well-understood, widely used, and judicially sanctioned, the Commission will ensure consistency, predictability and uniformity throughout the state. The Commission also will significantly reduce the likelihood of additional disputes coming to it. The precedent applied from these cases to other, future potential disputes will be readily understood in light of the robust regulatory framework under the FCC approach and will provide parties clear guidance going forward. Further, utilities and attachers will not be left to grapple with implementing novel and untested methodologies that could result in unintended and arbitrary outcomes. The FCC approach thus gives this Commission "unimpeachable" evidence of "just and reasonable" pole attachment rates for Blue Ridge under G.S. 62-350.

C. To The Extent The Commission Considers Externalities And Value Of Service Principles, Those Factors Favor Adoption Of The FCC Rate.

Externalities and value of service principles associated with rates "have seldom if ever been determinative" in the Commission's approach to rate regulation. *JOEMC Order* at 43. But, as the Commission acknowledged in its prior orders under G.S. 62-350, it "has considered both in past cases, at least in considering different classes of service." *Id.*[82] In this case, G.S. 62-350(c) directs the Commission to set pole attachment rates in case-by-case proceedings that are "just and reasonable" and "consistent with the public interest." The Commission should thus "consider any externalities inherent in higher or lower pole attachment rates," as well as the impact (if any) of the rate on value of service principles, in assessing whether the rates proposed by the parties are consistent with the public interest. *Id.*

[82] *See, e.g., State ex. rel. Utilities Comm'n v. Durham*, 282 N.C. 308, 314-15 (1972); *In re Public Service Co. of N.C., Inc.*, Docket No. G-5, Sub 386, 1998 WL 941806, ¶ 57 (NCUC 1998).

Charter provided the only economic analysis of these issues. Ms. Kravtin testified about the negative externalities of excessively high pole attachment rates, explaining that they "operate like a non-cost based tax on the final or 'downstream' communications and broadband services bought by consumers."[83] "[H]igh pole attachment rates result in higher prices for communications services which in turn serve to reduce consumers' demand for and/or ability to pay for these services."[84] Higher rates also "discourage communications companies from making additional investment in the state and their ability to roll out, or continue to expand advanced broadband service offerings."[85] The "dampening effect" of high pole attachment rates on broadband service deployment and adoption rates is especially serious in more rural and less densely populated areas due to the fact that these areas contain fewer potential customers per pole.[86] High pole attachment rates thus negatively impact national and state efforts to promote broadband deployment and adoption, particularly in rural areas.[87] And the per-capita allocation Blue Ridge seeks would only compound this problem, by imposing higher rates in rural areas where there are fewer attachers and where broadband penetration is most problematic.[88]

Conversely, lower pole attachment rates will assist in the expansion of broadband. It is an economic truism that, all other things being equal, lower input costs (such as Charter's pole attachment expenses) will encourage expansion of service.[89] As in the

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[83] Kravtin, Tr. Vol. 4, p. 175.
[84] *Id.*
[85] *Id.* at p. 176.
[86] *Id.* at pp. 231-32.
[87] *Id.* The FCC "has repeatedly recognized the importance of pole attachments to the deployment of communications networks." *Id.* at p. 178-79, n.19. FCC Chairman Pai, for example, has emphasized that lower pole attachment rates are important "[t]o bring the benefits of the digital age to all Americans." *Id.* And the North Carolina Department of Information Technology is developing its own broadband plan to ensure affordable broadband access to sparsely populated areas. *Id.*
[88] *Id.* at pp. 231-32.
[89] *Id.* at p. 176.

prior cases, Blue Ridge's rate expert, Mr. Arnett, has offered no evidence or economic justification for why the Commission should favor higher pole attachment rates in its public interest analysis.[90] Nor did Blue Ridge offer any other reason for the Commission to revisit its conclusion that "there is a general benefit in the expansion of broadband service," and "that lower pole attachment rates would likely assist in the expansion of broadband service." *JOEMC Order* at 44.

The non-profit status of Blue Ridge also does not present "any compelling argument for higher pole attachment rates." *Id.* at 45. As in the prior cases resolved by the Commission, the undisputed evidence establishes that the poles owned by Blue Ridge are fundamentally the same as the IOU and ILEC poles that Charter also relies on in North Carolina. The record makes clear that "EMCs in North Carolina use the same type of pole plant, technology, and production techniques to provide electricity service to subscribers in the same basic manner and under the same operating conditions as IOUs."[91] Furthermore, the IOUs, ILECs, and Blue Ridge use poles that are indistinguishable, and Charter's facilities are the same regardless of the pole owner.[92] Ms. Kravtin testified that, if anything, Blue Ridge's costs are less than the costs of the IOUs because the Cooperative has a lower cost of money.[93] The FCC rate formula, as

[90] Mr. Arnett, who is not an economist, argues that higher pole rates will result in lower electric rates – an argument that apparently won the day in TVA's closed pole attachment decision. Yet, this Commission does not have jurisdiction over the electric rates charged by Blue Ridge, and it is beyond dispute that the Cooperative would not support action by this Commission to assert any such jurisdiction. *See JOEMC Order* at 44 ("The Commission is confident that the Cooperatives do not intend to suggest that G.S. 62-350 gives the Commission jurisdiction over cooperative electric rates."). Further, Blue Ridge introduced no evidence either that its electric rates need to be reduced or that the higher pole rates it now seeks would have any material effect on its electric rates.

[91] Kravtin, Tr. Vol. 4, p. 180.

[92] *See supra* at p. 13 & n. 29; *see also JOEMC Order* at 45.

[93] Kravtin, Tr. Vol. 4, p. 181.

recommended by Charter here, would nonetheless award Blue Ridge the same cost of money as the IOUs receive.

Finally, like the other cooperatives, Blue Ridge has offered no compelling reason for the Commission to consider the benefits Charter receives from attaching to Blue Ridge poles as part of a "value of service" analysis. The Commission has "looked to value of service as a factor to be considered in rate design for different classes of customers." *JOEMC Order* at 46. But it has done so "traditionally as a *downward constraint on rates* recognizing that certain classes of consumers may have substitute service available in some situations." *Id.* (emphasis added); *see also State ex. rel. Utilities Comm'n v. Durham*, 282 N.C. 308, 314-15 (1972); *Order Granting Partial Rate Increase*, Docket No. G-5, Sub 386, 1998 WL 941806, ¶ 57 (NCUC 1998). That concept is inapplicable here, because the Commission is not tasked with designing rates for different classes of customers. Charter has no viable substitutes to attaching to the Cooperative's poles.[94] The Commission, moreover, "has never applied the concept to increase the rates paid by customers on the basis that the service is particularly 'valuable' to the consumer." *JOEMC Order* at 46. "Nor has the Commission ever set a customer's rate based on the 'value' to the customer of avoiding the prohibitive cost of providing the utility service to itself." *Id.*

In any case, Mr. Arnett's argument that Charter should pay equally for access to the poles' common or "unusable" space because it allegedly obtains equal benefit to that received by Blue Ridge ignores the crucial difference in the rights the parties enjoy to the poles. Charter is, at most, the recipient of a temporary and conditional right to use the

[94] *See* Mullins, Tr. Vol. 3, p. 227.

pole. There is no question that Blue Ridge does not construct or maintain its poles to serve Charter. Blue Ridge may displace Charter from its poles whenever it requires the space occupied by Charter for its own electric service. And Charter occupies only a foot of usable space compared to the Cooperative's claimed use of 8.5 feet or more.[95] The Cooperative's position that Charter obtains equal use of the unusable space is utterly without basis.

II. THE RECORD EVIDENCE FAILS TO SUPPORT THE REASONABLENESS OF BLUE RIDGE'S POLE ATTACHMENT RATE.

A. Blue Ridge's Disputed Rate Far Exceeds The FCC Maximum Rates And The Highest Rates Charged By IOUs And ILECs In North Carolina, And Is Not Supported In The Record.

Blue Ridge's $26.64 rate defies any measure of reasonableness. This rate far exceeds the maximum rates calculated by Ms. Kravtin under the FCC's fully allocated cost methodology. For example, for 2017, Ms. Kravtin's calculations set the maximum just and reasonable rate for Blue Ridge at $5.22, less than one-fifth the rate charged by the Cooperative that year. The Cooperative's rate is nearly *four times* higher than the average IOU rate Charter paid in North Carolina in 2017, and more than *ten times* higher than the average ILEC rate Charter paid in the state that year.

There is no evidence in the record identifying how Blue Ridge's aberrant rate was calculated or derived. There is no evidence indicating whether it was even cost-based. The evidence instead points to the conclusion that it was not and never has been cost-based. In 2014, one month before Blue Ridge proposed the $26.64 rate to Charter for its new agreement, Mr. Layton ran a variety of purported cost-based formulas to "get an

[95] *See, .e.g.*, Mullins, Tr. Vol. 3, p. 223; Booth, Tr. Vol. 3, p. 67, 104-05.

understanding of what some of those rates calculated."[96] His results ranged from $4.56 up to a high of $18.90 using the most pole-owner friendly methodology developed at the time.[97] None of his cost-based calculations came anywhere close to supporting Blue Ridge's actual rate of $26.64. Yet, despite this, Blue Ridge proposed to keep its rate at $26.64 in Charter's proposed new agreement, with an automatic annual escalator to boot.[98] Not until TVA adopted its flawed approach in 2016 did Blue Ridge find a methodology that might possibly support its excessive rate. Even then, Blue Ridge could do so only by moving far ahead of TVA by crafting its own novel methods for rebutting the TVA's presumptive inputs, and only in a manner that served to increase its calculated rate by shifting nearly half of the pole costs to Charter.[99]

B. The TVA Approach Is Arbitrary, Results-Oriented, Unpredictable, And Unreasonable.

Like the FCC rate formula, the TVA method assigns to the communications services provider the cost of the foot of space its attachment occupies. But it also allocates the cost of the 40-inch safety space to the communications attachers on the pole. And it allocates the cost of the 24 feet of unusable space to all attachers on a per-capita basis. Finally, the TVA approach assumes three attaching entities – the pole owner and two communications companies. The result is an allocation by TVA of 28.44 percent of the total pole costs to each third-party communications attacher, and 43.12 percent of the total pole cost to the pole owner, if the rebuttable presumptions are used. In other words, when the presumptions are used, the TVA approach allocates more of the pole costs to

[96] Layton, Tr. Vol. 1, p. 180.
[97] *Id.* at 179.
[98] *Id.*
[99] Arnett, Tr. Vol. 2, p. 60-66.

third-party communications attachers than to the pole owner, even though the pole owner occupies the majority of the usable space and communications attachers like Charter have only contingent rights to use surplus usable space. Here, Blue Ridge purports to rebut a host of TVA's presumptions – which are the same as the FCC's, except the FCC rate does not use the number of attaching entities as an input – resulting in an allocation of 41.16 percent of Blue Ridge's pole costs to Charter alone.

Blue Ridge has not offered any economic testimony or other evidence in this case warranting the Commission to revisit its conclusion that the TVA approach is "without any basis in economic theory." *JOEMC Order* at 46. The evidence here again demonstrates that TVA's approach is fundamentally marred by a biased, one-sided process that involved only those parties who stood to benefit from the highest possible pole attachment rates – TVA's wholesale electric power customers and their trade association.[100] TVA did not consult the FCC to understand the FCC's long-standing methodology, the communications companies who would be forced to pay its customers' rates, or anyone else who could better inform its findings.[101] As a result, TVA rejected the FCC methodology based on demonstrably false information supplied by its customers – including that the FCC rate does not allocate the costs of unusable space (it does), that the FCC rate creates a subsidy (it does not), and that the safety space is unusable by the pole owner (it is usable and used by pole owners).[102] Unlike this

[100] Kravtin, Tr. Vol. 4, pp. 173-74, 215-17.
[101] *Id.* at pp. 173-74, 218-19.
[102] *Id.*

Commission, however, TVA was not charged with a statutory mandate to determine a just and reasonable rate.[103]

The evidence in this case still does not establish a "principled basis grounded in cost causation for [TVA's] arbitrary allocation of costs associated with unusable space on a per-capita basis." *JOEMC Order* at 37. That is because there is no economic, principled basis for a per-capita allocation: it is "rooted in the pure numerical convenience of dividing costs by users." *Id.* And TVA's per-capita allocation of the costs of the "unusable space" yields extraordinarily high and unpredictable results. The only economic analysis in the record shows that an attacher could end up paying significantly varying rates based on factors (the presence or absence of other attachers) that have nothing to do with the space it occupies or the pole owner's underlying costs.[104] As TVA's own analysis demonstrated, a rate could double from $17.69 to $34.19 based only on the number of attaching entities, where the space occupied and the cost of pole ownership were held constant.[105] The unrebutted evidence thus demonstrates that the TVA rate "would result in widely fluctuating rates depending on the number of third party attachers," with no "principled reason why" that should be the case. *Id.*

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[103] *Id.* Blue Ridge argues that its "charge" is similar to that of TVA's, because the General Assembly formed cooperatives, in part, to "mak[e] electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management." G.S. 117-10. But G.S. 62-350 nowhere charges the Commission with prioritizing low electric rates for cooperatives above all else, particularly where doing so would violate sound economic cost-causation principles and require their communications service provider members to subsidize electric rates for other members. *See also* 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.").

[104] Kravtin, Tr. Vol. 4, pp. 225-27.

[105] *Id.* The FCC abandoned its old Telecom Formula in 2011 because its reliance on a per-capita approach led to irrational results, particularly where pole owners selectively "rebutted" only those presumptions that favored them, such as the presumed number of attaching entities. *Id.* at p. 232.

The Cooperative's proposed per-capita allocation of the unusable space also finds no support in Commission precedent. The underlying premise that the parties benefit equally from the common space is the precise argument rejected by this Commission in the *Collocation Order* under similar facts, as well as in its four prior pole attachment orders. *See id.* at 37-38. As the Commission has explained, "[t]he question is not whether [an attacher] benefits from the portions of the pole that are buried and are used to achieve minimum grade clearance." *Id.* at 37. The proper question is "what is the just and reasonable proportion of that cost to allocate to" the attaching entity. *Id.* at 37-38. Here, as in the prior cases, Blue Ridge did not "provide any expert economic testimony to support [its] position," and this record confirms no "such economic basis exists." *Id.* at 38. It is instead undisputed that Charter occupies only a small percentage of the usable space on the poles (7.41 percent), and even that occupancy is contingent and subject to the needs of the Cooperative. And there is no evidence Blue Ridge spends capital to make space available for Charter. Charter is entitled only to surplus space on the pole, if it is available, or else Charter must spend capital to make space for its attachments or install a larger and stronger pole. Even where Charter pays to install a pole, the Cooperative continues to own it, Charter must pay rent on it, and Blue Ridge may still kick Charter off the pole if it needs additional space for its electric service. "By any reasonable measure," Charter "does not enjoy equal benefits to those of [Blue Ridge] from the common, or unusable, space on" Blue Ridge's poles. *Id.*

As the Commission has observed, Charter's very limited rights to use the Cooperative's poles is similar to the limited rights enjoyed by customers of "interruptible" electric service. *Id.* at 47. As with pole attachments, utilities do not

construct plant to serve interruptible electric service customers and those customers may be denied service where it ceases to be available. The Commission has long recognized that such limited rights to service justify lower, not higher, rates.[106] The record facts and their similarity to the facts related to interruptible service would justify a rate even lower than the FCC rate, such as a rate set closer to marginal cost – but certainly not rates in the range of Blue Ridge's existing rates.

The evidence in this case also does not support TVA's allocation of the "safety space" to the communications attachers. Charter agrees with the Commission that it makes no difference whether the safety space happens to exist because the pole carries dangerous electric power or because the pole contains a communication attachment – or because both of these facts are present together. *Id.* at 38. What matters from an allocation perspective is whether the space is usable and/or used. The evidence establishes that Blue Ridge is the *only* pole occupant who can use the safety space.[107] And the Cooperative does, in fact, use the safety space and generate revenue from it.[108] On these facts, there is no reasonable basis to allocate to Charter "up to 100% of the costs of space it cannot use, while allocating to the pole owner none of the costs associated with space that it can, and in fact does, use." *Id.* at 39. Blue Ridge has offered no reason

[106] *See id.* at 47; *see also State ex. rel. Utilities Comm'n v. Durham*, 282 N.C. 308, 308 (1972) (noting that "interruptible customers pay at a substantially lower rate than the firm customers"); *Order on Petition for Limited Waiver of Rate Schedule 106 Billing Procedures*, Docket No. G-9, Sub 649 (Oct. 29, 2014) (reciting evidence that Piedmont's interruptible transportation customers paid between 28.6% and 36.3% less than firm customers for the first 15,000 therms of service; concluding that "in exchange for agreeing to curtail their service Piedmont's interruptible customers pay substantially lower rates than Piedmont's firm transportation customers"); Cost-of-Service Rates Manual, Federal Energy Regulatory Commission, June 1999, at 41, available at https://www.ferc.gov/industries/gas/gen-info/cost-of-service-manual.doc ("[P]aying the lowest unit rate that a firm shipper could pay for firm service, appropriately recognizes the inferior quality of interruptible service.").

[107] *See supra* at p. 12, n. 26 & 27.

[108] *Id.*

for the Commission to depart from its prior conclusion, which is consistent with the rulings of the Business Court and a long line of precedent rejecting this decades-old and unsupported argument made by pole owners.[109]

TVA's extraordinary allocation of pole costs is unprecedented. While Mr. Arnett pointed to several approaches he argued contain elements of the TVA's approach, none have been followed by other regulators, and none go so far as the TVA. Mr. Arnett has consistently advocated in public proceedings across the country for an allocation similar to, though less ambitious than, TVA's approach, but no regulator has ever adopted his recommendations.[110] Mr. Arnett admitted that he has no knowledge of another regulator following any of the other methodologies referenced in his testimony.[111] And Mr. Arnett now believes the rate methodologies he then recommended are not reasonable.[112]

Because TVA's approach is untested and unmoored from sound economic policy, it is prone to idiosyncratic, inconsistent, and unpredictable results. The approach produced rates as high as $85 per pole per year for TVA's wholesale electric power customers.[113] Several rates were in excess of the $70 mark, and many rates exceeded $45

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[109] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion & Second Report & Order, 72 FCC 2d 59, 69-71 (1979) ("Second Report & Order") (finding, based on an extensive record, that safety space is to be considered usable space for ratemaking purposes, and that no portion of the safety space is to be considered occupied by cable television), *aff'd on recon.*, 77 FCC 2d 187, 188-191 (1980) (affirming that "electric utilities make resourceful use of safety space for mounting street light support brackets, step-down distribution transformer and grounded shielded power conductors"); *aff'd sub nom.*, *Monongahela Power*, 655 F.2d at 1256 (FCC's treatment of safety space as usable space was "a conscientious exercise of discretion," supported by the record evidence of "industry practice, . . . on utility companies' profitable use of the safety clearance space, and . . . the risk of replacement cost that many utility contracts [impose] on their [cable] lessees."); *2000 Fee Order*, 15 FCC Rcd at 6467 ("The [safety] space is usable and is used by the electric utilities."); *Landis*, 2014 WL 2921723 at *12; *Rutherford*, 2014 WL 2159382 at *6.

[110] *See* Arnett, Tr. Vol. 2, p. 141.

[111] *See id.* at pp. 146-47; Kravtin, Tr. Vol. 4, pp. 224-25.

[112] *See* Arnett, Tr. Vol. 2, pp. 133, 140-42.

[113] *See* Kravtin, Tr. Vol. 4, p. 225.

per pole per year.[114] These rates were so high and irrational that even pole owners tasked with charging them expressed concerns, with some asking for caps or waivers.[115] The approach also produces rates that fluctuate dramatically based on minor cost differences. For example, while the mean pole rate for all of TVA's customers was $31 per pole, the rates ranged from $17 to $45 within only one standard deviation. As Ms. Kravtin explained, "[t]his is a very undesirable characteristic for a regulated rate, or for any rate for that matter, as markets operate best with stable, consistent, predictable prices."[116]

Given the inherent flaws in the TVA approach, the Commission should decline Blue Ridge's request to allow it to justify its excessive rates under it.

C. The Commission Should Reject The Cooperative's Attempts To Rebut Formula Inputs.

The problems with the TVA rate ultimately led to a requirement that TVA staff review and approve every rate calculation.[117] The Cooperative's own TVA calculations highlight the scores of implementation issues that even the TVA has not yet addressed. Because the TVA rate method alone could not justify Blue Ridge's excessive rate, Mr. Arnett designed his own methods for "rebutting" numerous TVA presumptions – including the appurtenance reduction for the pole investment account, pole height, usable and unusable space, and the amount of space used by Charter's attachments – all of which were designed to, and ultimately did, increase Blue Ridge's calculated TVA rate.[118] But with the exception of the attaching entities presumption, TVA has offered no guidance about how to rebut its various presumptions, and Blue Ridge has offered no

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[114] *Id.*
[115] *Id.*
[116] *Id.* at p. 226.
[117] *See* PDK Ex. 14 at 3 ("[B]efore an LPC may apply the rate . . . Staff must validate data and approve such rate.").
[118] Arnett, Tr. Vol. 2, pp. 60-65, 187-88.

evidence that TVA would accept Mr. Arnett's novel theories about how to rebut its presumptions.[119]

Nor does the record support using Blue Ridge's inputs in the calculation of its rate under the FCC methodology. *First*, there is no evidence in the record supporting that approach or calculating the FCC rate using the Cooperative's inputs. *Second*, and more fundamentally, Mr. Arnett's approaches to rebutting these inputs violate the FCC's rules and precedent developed over decades of implementation. Specifically:

- Appurtenance Reduction. To rebut the presumption that an average of 15 percent of the pole investment account (Account 364) consists of appurtenances that do not benefit third-party attachers, Mr. Arnett counted only cross-arms and brackets listed separately in Blue Ridge's continuing property records.[120] Mr. Arnett failed to count other items in that account, such as very tall (and expensive) poles that generally do not have attachments and other appurtenances that are not separately listed, such as insulator pins and racks.[121] This violates FCC precedent. The FCC requires the pole owner to "include[] an adequate allowance for all fixtures and apparatus not essential for pole attachments." *Capital Cities Cable, Inc. v. Mountain States Tel. & Tel. Co.*, 1984 FCC LEXIS 2443, ¶¶ 15-16, n.10 (June 29, 1984) (emphasis in original). Adjustments to the 15 percent presumption must include the costs of

[119] Kravtin, Tr. Vol. 4, p. 187.
[120] Arnett, Tr. Vol. 2, pp. 61-62; WA Ex. 9.
[121] *Id.* Notably, Mr. Arnett did not attempt to rebut the appurtenance presumption in any of the four previous cases in which he submitted testimony, likely because in two of the cases rebutting the presumption would have *lowered* the cooperative's rate, even using his incomplete approach to counting appurtenances. Kravtin, Tr. Vol. 5, pp. 120-22.

"transformer racks and platforms, racks complete with insulators, brackets, extension arms, head arms, guards, insulator pins, suspension bolts, and railings." *Trenton Cable TV, Inc. v. Missouri Pub. Serv. Co.*, FCC File No. PA-81-0037, ¶ 8 (Feb. 12, 1982) (Appendix L1).[122]

- Pole Height. To rebut the presumptive pole height of 37.5 feet, Mr. Arnett calculated average pole heights for each year at issue based on the continuing property records of all of Blue Ridge's distribution poles in Account 364.[123] Mr. Arnett did not exclude from his calculation those poles containing only Blue Ridge facilities (and no communications facilities), nor could he, because Blue Ridge has not done those calculations.[124] Mr. Arnett's approach violates the FCC requirement to "restrict[] calculations of usable space" and pole height "to poles actually bearing attachments." *Hobbs Cablevision, Inc. v. Gen. Tel. Co. of Southwest*, FCC File No. PA-81-0003, ¶ 5 (Aug. 2, 1983) (Appendix L2); *see also Teleprompter Corp. v. Gen. Tel. of Southwest*, FCC File No. PA-80-0016, ¶¶ 4-5 (Oct. 24, 1983) (Appendix L3). This approach "avoids unfair skewing of the result by the inclusion of irrelevant or uncharacteristic data." *Hobbs Cablevision*, FCC File No. PA-81-0003 ¶ 5.

[122] FCC cases which have not been publicly reported in the FCC Reports, the FCC Record or LEXIS are attached in Appendix L to this brief.
[123] Arnett, Tr. Vol. 2, pp. 61-62, 187-88.
[124] Layton, Tr. Vol. 1, p. 118 (testifying that the Cooperative has "not calculated" the average height of poles for "the subset of 56,000 poles that have a third-party attachment").

- Unusable and Usable Space. To rebut the presumptions for unusable and usable space (24 feet and 13.5 feet, respectively), Mr. Arnett relied on his incorrect pole height calculation.[125] He also relied on a deeply flawed estimate of unusable space (27.26 feet) based on unsupported assumptions about the average mid-span clearance for communications cables, the average span length between poles, and the expected "sag" of communications cables.[126] Mr. Arnett's approach violates the FCC's rules for the same reason his pole height calculation falters: he inappropriately looked to all Blue Ridge distribution poles, instead of only those that contain communications attachments. *See* 47 C.F.R. 1.1404(g)(xi) & (xii); *Teleprompter Corp. v. Gen. Tel. Co. of Southwest*, FCC File No. PA-81-0024 ¶ 6 (Jan. 19, 1983) (Appendix L4). Mr. Arnett's calculations of the mid-span clearance and sag also should be rejected because, on cross-examination, he conceded he had no basis for assuming an overall average mid-span clearance of 15.5 feet, and he did not include in his calculations all poles that carry distribution conductors.[127]

[125] Arnett, Tr. Vol. 2, pp. 61-65.
[126] *Id.*
[127] *Id.* at pp. 195-98. Mr. Arnett calculated an average minimum attachment height by assuming that the lowest communications conductor would have to be at least 15.5 feet above the ground at mid-span and that there is an average span is 257 feet long. In making this latter calculation, he divided the miles of Blue Ridge's aerial conductors (based in its records) by the number of all distribution poles. But he failed to account for the fact that some distribution facilities are attached to transmission poles, which he did not count. He also failed to account for the fact that some distribution facilities are on poles owned by joint pole users. Thus his calculated average span length is off by some unknown amount.

- Space Used by Charter's Attachments. Mr. Arnett accepted the presumption that Charter's attachments use one foot of usable space.[128] But he argued, based on Blue Ridge's audit results showing 27,674 attachments on 24,888 poles, that Charter should be treated as occupying 1.11 feet on average.[129] If Blue Ridge is permitted to charge Charter the FCC rate for any attachment that is not within one foot of another attachment, Charter does not object. It would be inappropriate, however, for the Commission to allow Blue Ridge to charge per attachment and also to use an average occupancy of more than one foot per attachment, as this would amount to a double counting.[130]

The Cooperative's self-serving and flawed attempts to rebut these presumptions underscore the benefits of the Commission approving not only the FCC rate methodology, but also the wealth of guidance, precedent, and interpretations developed by the FCC over the course of decades. By rejecting Blue Ridge's inputs as violative of FCC precedent, the Commission will establish clear rules of the road for the parties to follow in calculating the maximum just and reasonable rate under G.S. 62-350, and minimize disputes. Additionally, the Commission should not allow a pole owner such as Blue Ridge to cherry pick and rebut only the presumptions that benefit it.[131]

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[128] *Id.* at pp. 62-63.
[129] *Id.*
[130] Blue Ridge has long charged Charter on a per-attachment, rather than per-pole, basis, in violation of the parties' agreement. But that issue is not before the Commission. Mullins, Tr. Vol. 3, p. 251.
[131] *See* Kravtin, Tr. Vol. 5, p. 122 (testifying that in all the cases she been involved in, she has never seen a utility rebut a presumption that would lead to a lower pole attachment rate).

D. In Addition To The Recurring Rate, Charter Should Be Obligated To Pay Only Blue Ridge's Measurable And Verifiable Costs Directly Attributable To Providing Pole Attachment Space To It.

Charter agrees that it should pay, in addition to the recurring rate, any measurable and verifiable expenses incurred by Blue Ridge directly attributable to Charter's attachments. This is consistent with the FCC rate methodology and the Commission's prior orders under G.S. 62-350. *See JOEMC Order* at 50, 54. These costs include those incurred making poles ready for Charter's attachments (including installing a new pole and removing the old pole, where necessary). They also include the direct costs incurred processing Charter's applications, and conducting pre-construction inspections and engineering, post-construction inspections, and auditing those poles to which Charter is attached.[132]

But Blue Ridge wants more than these verifiable direct costs. It asks the Commission for free reign to collect additional, generalized, non-specific, and non-verifiable categories of costs it alleges it would not incur "but for" Charter's attachments. While Blue Ridge asserts vague categories of costs it alleges are not recovered, the Cooperative has not submitted any cost studies and has not otherwise identified specific amounts it contends Charter should be charged. Nor has it presented any evidence that these undocumented costs should be added to the fully allocated costs allowed under the FCC's methodology.[133]

The Cooperative's request for unspecified and unquantified categories of alleged "but for" costs is unprecedented and uncontainable. The Commission rejected the same request in its prior orders, noting that it "has never allowed recovery of undocumented

[132] Kravtin, Tr. Vol. 4, pp. 198-99; Martin, Tr. Vol. 4, pp. 84, 87.
[133] Kravtin, Tr. Vol. 4, p. 201.

and unverified additional costs." *Id.* at 54. Blue Ridge has offered no reason (let alone evidence) warranting a departure from this position, which is consistent with the Commission's own precedent as well as FCC precedent. *See, e.g.*, *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 106, at 23-24 (Dec. 19, 2007) ("[U]ncertain and unquantifiable costs . . . should not be taken into account in calculating avoided cost rates."); *2011 Pole Attachment Order*, 26 FCC Rcd at ¶¶ 189-90 (rejecting similar claims by electric utilities that were submitted without any cost study).

III. RATES AND REFUNDS OF OVERPAYMENTS

Table 1, below, identifies the maximum just and reasonable rates for each year at issue for Blue Ridge, derived from the FCC rate formula. Detailed calculations are found in Ms. Kravtin's testimony and work papers.[134]

TABLE 1

MAXIMUM JUST AND REASONABLE FCC RATES			
Rate Year	2017	2016	2015
Cost Data for Year Ending	2016	2015	2014
Rate	**$5.18**	**$5.20**	**$5.22**

G.S. 62-350(c) expressly requires the Commission to award reimbursement of overpayments. The statute provides that any new rates set by the Commission "shall apply . . . retroactively to the date immediately following the expiration of the 90-day-negotiating period or initiation of the proceeding, whichever is earlier." G.S. 62-350(c). Here, the 90-day negotiating period expired before the initiation of this proceeding, on August 25, 2015. Blue Ridge sent a proposed new agreement to Charter in 2014.

[134] Kravtin, Tr. Vol. 4, pp. 211-15.

Charter responded to Blue Ridge's proposal on May 26, 2015, declaring at that time its intent to negotiate the agreement – including the rate – by submitting a redline of it.[135] Contrary to Blue Ridge's contention that Charter did not dispute the rate, Charter's redline flags Blue Ridge's rate and notes: "To be determined. These rates are to be calculated in accordance with the FCC cable formula."[136] Accordingly, Charter requested to negotiate the rate at that time – consistent with the requirements of G.S. 62-350(b) – and the negotiating period expired 90 days later.

Charter's expert Ms. Kravtin calculated Charter's overpayments for each year at issue pursuant to G.S. 62-350, and based on the FCC rates she derived for Blue Ridge and the number of attachments for which Charter paid a disputed rate to the Cooperative.[137] Accordingly, Charter requests the Commission award refunds of Charter's overpayments in the amounts depicted below in Table 2, through August 2017, and order Blue Ridge to refund any additional overpayments made after August 2017 based on the Commission's adjudication of a just and reasonable rate.

TABLE 2

OVERCHARGES BY BLUE RIDGE EMC TO CHARTER IN RELATION TO JUST AND REASONABLE FCC RATE			
Rate Year	**2017**	**2016**	**2015**
Cost Year	**2016**	**2015**	**2014**
Overcharges	**$248,891***	**$563,805**	**$197,555**
Total Overcharges	**$1,010,251**		

*The 2017 calculation reflects overcharges calculated through August 2017.

[135] Mullins, Tr. Vol. 3, p. 236-37; *see also* Layton Ex. 7.
[136] *See* Layton Ex. 7, Draft Redline Agreement, Ex. C.
[137] Kravtin, Tr. Vol. 4, p. 215.

IV. THE COMMISSION SHOULD APPROVE AS JUST AND REASONABLE THE INDUSTRY-STANDARD TERMS AND CONDITIONS OF ATTACHMENT PROPOSED BY CHARTER.

The Commission should approve as just and reasonable the industry-standard terms and conditions of attachment proposed by Charter. Charter's witness Mr. Martin introduced evidence of the similar terms and conditions present in Charter agreements across the state.[138] These terms and conditions represent established industry standards reached in negotiations between Charter and pole owners of all kinds – including IOUs, ILECs, municipal utilities, and cooperatives – and serve as the most reliable barometer of what terms and conditions are just and reasonable. These standard terms have worked for pole owners and attachers alike with minimal disputes or disruptions.

As the Commission has found, "[w]here there are templates for resolution of similar concerns that have been accepted by a regulatory authority that has dealt with pole attachments for decades, and where large numbers of electric cooperatives have accepted terms and conditions as safe and protective of the reliability of their networks when there was no regulatory oversight, the Commission will look closely to those sources as potentially reflecting an unbiased resolution of the issues presented by the parties in this case." *JOEMC Order* at 52. The Commission, moreover, has already addressed most of the terms and conditions at issue in this case in its prior orders, *see id.* at 52-77, and Blue Ridge has submitted no evidence warranting any departure from those prior orders. To assist the Commission, Charter has prepared and attached detailed appendices to this brief identifying the record support for each of the industry-standard

[138] NM Ex. 3.

terms and conditions it proposes the Commission approve as just and reasonable, as well as applicable precedent supporting its position. *See* Appendices A-K.

Blue Ridge, like the cooperatives in the earlier pole attachment cases before the Commission, urges the Commission to jettison the industry-standard terms and conditions other utilities across the state have found acceptable for decades. In place of these established and well-understood terms and conditions, Blue Ridge asks the Commission to approve many of the same novel and restrictive terms proposed by its expert, Gregory Booth, that the Commission already has rejected. Blue Ridge also asks the Commission to approve a number of oppressive terms that it has unilaterally imposed on Charter since at least 2003, in agreements that predated the enactment of G.S. 62-350. Contrary to Blue Ridge's assertions, the fact that Charter agreed to these terms in the past proves only that Charter lacked any viable means of contesting them in an unregulated market. It certainly is not a measure of their reasonableness in a regulated environment, particularly when considered against prevailing industry standards in both regulated and unregulated environments.

The terms Blue Ridge seeks to impose on Charter not only depart from industry-standard, they also depart from Blue Ridge's own customary standards applicable to other third-party attachers. Blue Ridge has insisted on cloaking its pole attachment agreements with Charter and other attachers under broad confidentiality requirements, including in this proceeding. The reason is now clear: Blue Ridge has long imposed a host of discriminatory and burdensome terms and conditions on Charter – in addition to a much higher rate – that it has not imposed on other third-party attachers, including

Charter's direct competitors in the provision of video, broadband, and voice services.[139] This is a clear violation of G.S. 62-350(a)'s nondiscrimination requirement. But it is also compelling evidence that the terms Blue Ridge has imposed, and seeks to impose, on Charter do not serve legitimate interests Blue Ridge may have about the reliability of its network. If these terms were rooted in legitimate concerns, then Blue Ridge would have sought to terminate or renegotiate its existing (or expired) contracts with other attachers, to include them, which it has not done.[140]

Nor can Blue Ridge point to its recent audit results as a basis for imposing more restrictive terms on Charter than on other third-party attaching entities. *First*, Blue Ridge imposed discriminatory terms against Charter long before it knew of its audit results in 2016.[141] *Second*, there is no evidence as to what party is responsible for the majority of "violations" detected in the audit and associated with Charter's facilities. The evidence instead establishes that each violation requires a case-by-case assessment and coordination between the parties to determine causation.[142] *Third*, Section 62-350(d) requires pole owners to give written notice to communications services providers of alleged safety violations, to work cooperatively to determine causation and responsibility, and to afford time for correction. Those processes have not yet run their course. Accordingly, the Commission has no basis to act on, or to rely on, the incomplete and inconclusive photographic evidence presented.[143] *Fourth*, the audit results show code

[139] Charter competes directly with Blue Ridge's joint users. Mullins, Tr. Vol. 3, pp. 238-42; *see also* Layton, Tr. Vol. 1, pp. 157-65.
[140] *See* Mullins, Tr. Vol. 3, pp. 238-42; *see also* Layton, Tr. Vol. 1, pp. 165-66.
[141] *See* Mullins, Tr. Vol. 3, p. 244.
[142] *See* Mullins, Tr. Vol. 3, pp. 252-56; *see also* Layton, Tr. Vol. 1, pp. 200-01, 204-06.
[143] Mr. Booth has a long history of representing the interests of cooperatives in North Carolina, and his objectivity is subject to doubt. For example, in his role as a rate expert in the *Rutherford* case, he aggressively assigned responsibility to TWC for 69 percent of the cost of the unusable pole space and for

violations by all parties – including the Cooperative and joint users – and that Charter does not have the highest percentage of violations associated with its plant.[144]

If anything, the audit results – and Blue Ridge's handling of them – reinforces the need for the Commission to draw a hard line against discriminatory treatment under G.S. 62-350. Blue Ridge issued thousands of remediation tickets to Charter over a two-day span during the pendency of this litigation, and for purposes of this litigation.[145] But, despite identifying issues related to all attachers, Blue Ridge did not issue any tickets to any other attachers.[146] Worse, Blue Ridge did not even bother to identify whether Charter was the proper party to receive the ticket – *i.e.*, whether Charter could perform the work required in the ticket, or if it needed some other party (including Blue Ridge) to move its attachments or take some other action first, such as installing a larger pole.[147] This caused Charter to waste substantial time and resources determining, as a threshold question, whether Charter could even do the work called for by the ticket.

Charter thus urges the Commission to look to the strong weight of authority provided by established industry-standard terms and conditions acceptable to pole owners across the state. Charter also urges the Commission to reinforce that any requirements must be imposed and enforced on a nondiscriminatory basis, and forbid Blue Ridge from cloaking its requirements in needless confidentiality provisions. The result will be a stable and familiar regulatory and operational framework that meets settled expectations,

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61 percent of the entire pole costs – positions that were rejected by the court. *Rutherford*, 2014 WL 2159382 at ¶ 79.

[144] Mullins, Tr. Vol. 3, pp. 252-53; Layton, Tr. Vol. 1, pp. 188-192.

[145] Mullins, Tr. Vol. 3, pp. 253-54; Layton, Tr. Vol. 1, pp. 195-96.

[146] Layton, Tr. Vol. 1, p. 195.

[147] Layton, Tr. Vol. 1, pp. 196-97.

reduces disputes, and provides consistency, uniformity, clear guidance, and fairness to all parties.

CONCLUSION

For all of the foregoing reasons, Charter respectfully requests the Commission to find, consistent with its prior orders, that Blue Ridge's maximum just and reasonable rates for the years in dispute should be determined based on the FCC rate methodology, as calculated by Ms. Kravtin. Charter also requests the Commission to award reimbursement of overpayments to Charter based on the applicable just and reasonable rates. Finally, Charter requests the Commission to approve the industry-standard terms and conditions proposed by Mr. Martin as just and reasonable, and order those terms and conditions to be included in any new pole attachment agreement between the parties.

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

/s/ Marcus Trathen

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APPENDIX A
DISPUTED INVOICES[1]

Industry Standard:

- Blue Ridge agrees that Charter should have the right to dispute invoices. But it offers no compelling reason or industry standard supporting its proposed term that Charter be required to pay disputed invoices in full pending resolution of a dispute related to those invoices.

Blue Ridge's Proposal Conflicts with G.S. 62-350:

- Blue Ridge's proposal conflicts with G.S. 62-350. G.S. 62-350(c) requires a party bringing a dispute to the Commission to pay only "any undisputed fees related to the use of poles, ducts, or conduits which are due and owing under a preexisting agreement." Blue Ridge's expert attempted to minimize this language by narrowly interpreting it. But the Cooperative cannot dispute the General Assembly plainly deemed it reasonable for parties to pay only undisputed amounts pending the resolution of a dispute. *See* Martin, Tr. Vol. 4, p. 108.

Proposed Language:

- Neither party proposes language to address this term. Charter requests the Commission affirm the obligation of G.S. 62-350 to pay only undisputed amounts where a good faith dispute exists.

[1] Joint Issue List, Issue No. 3.a.

APPENDIX B
REQUIREMENTS REGARDING NEW ATTACHMENTS, OVERLASHING, AND DROP POLES[1]

Industry Standard:

Applications for New Attachments to Distribution Poles

- Permit applications should be submitted for all new attachments to distribution poles. Martin, Tr. Vo4. 1, p. 94-95; Layton, Tr. Vol. 1, p. 60.
- The Commission has approved industry-standard language requiring permit applications for all new attachments to distribution poles. *JOEMC Order* at 58-59.

Overlashing

- Permits should not be required for overlashing; notice is sufficient.
    - The Commission has found that prior notice of overlashing is reasonable and should be required in a new pole attachment agreement. *JOEMC Order* at 58-59.
- Blue Ridge's assertion that overlashing presents safety concerns is not borne out by the evidence.
    - The vast majority (72%) of Charter's 90 pole agreements in North Carolina do not require any notice or permitting for overlashing. *See* NM Ex. 3, Table 2, pp. 12-23. Of the remaining 25 agreements, 19 require notice only after the fact. *See id.* Only 6 agreements require permitting prior to overlashing being performed. *See id.*
    - EnergyUnited EMC and South River EMC recently signed agreements with a tiered notice requirement for proposed overlash projects, requiring 15 days prior notice for projects involving more than five poles, or at least 48 hours prior notice for projects involving five or fewer poles. Martin, Tr. Vol. 4, p. 93; NM Ex. 3, Table 2.
    - Charter is one of the only attachers required to submit a permit to Blue Ridge prior to overlashing, even though overlashing by third-parties is common and Charter's direct competitors are not subject to the same permitting requirements. Mullins, Tr. Vol. 3, pp. 225, 241-42; Martin, Tr. Vol. 4, p. 92; see MM Ex. 1.
        - Blue Ridge does not require any kind of notice of overlashing by joint user telephone companies, who often overlash bigger and heavier cables to their strand. *See* Martin, Tr. Vol. 4, pp. 93-94; *see* Mullins, Tr. Vol. 3, pp. 239-40.
- The FCC has found that advance notice is sufficient for overlashing:

[1] Joint Issue List, Issue No. 3.b.

- FCC adopted an express policy promoting overlashing because it does not materially affect the safety of an attachment and it "facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities." *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendments of the Commission's Rules and Policies Governing Pole Attachments*, Report & Order, 13 FCC Rcd 6777, 6807 ¶ 62 (1998) ("Telecom Order).
- FCC has rejected attempts to impose permitting requirements for overlashing as "unjust and unreasonable on [their] face." *Cable Television Assoc. of GA. v. GA. Power Co*., Order, 18 FCC Rcd 22287 ¶ 13 (2003).

Drop Attachments

- Post-installation notice of secondary (drop) pole attachments is standard in the industry. Martin, Tr. Vol. 4, pp. 94-95.
  - The Commission has found that post-installation notice for drop attachments is reasonable and should be required in a new pole attachment agreement. *JOEMC Order* at 58-59.
- Post-installation notice of secondary (drop) pole attachments is essential to enable Charter to meet federal requirements for providing service to customers within seven days of a request. 47 C.F.R. 76.309(c)(2)(i); Mullins, Tr. Vol. 3, pp. 233-34; Martin, Tr. Vol. 4, pp. 118-19.
- Post-installation notice of secondary pole attachments is sufficient to add those new attachments to the attachment count. Historically, service drops were not considered or counted as attachments. Martin, Tr. Vol. 4, pp. 94-95; NM Ex. 3.
  - None of the cooperatives in the prior proceedings required anything more than post-installation notice. *See JOEMC Order* at 57.
- For years, Blue Ridge has not required anything more than post-installation notice. *See* MM Ex. 1, Art. 6 (2008 Agreement); Layton Ex. 4, Art. 6. (2003 Agreement).
- Blue Ridge proposed a contract term in December 2015 that would allow *****BEGIN CONFIDENTIAL***** [redacted] *****END CONFIDENTIAL*****. Layton, Tr. Vol. 1, p. 184-85. Mr. Layton testified the proposal was reasonable at the time it was made. *Id.* Charter was "agreeable to [paying] . . . five years of back rent, . . . back to the last audit on [] service drop attachments." Martin, Tr. Vol. 3, p. 15.

Charter's Proposed Language: Charter proposes the following language to govern the permit and approval process, which addresses overlashing and drop notifications. This language is substantively identical to the language proposed by TWC in the prior pole attachment cases before the Commission, except that Charter proposes explicit language clarifying all permit and approval processes are to be applied in a non-discriminatory

manner, consistent with G.S. 62-350, and based on the record of discrimination established in this case. *See JOEMC Order* at 59.

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

APPENDIX C
CERTIFICATION[1]

Industry Standard:

- Charter should not be required to routinely submit post-installation certifications from a professional engineer to establish that its attachments have been made in accordance with applicable engineering standards. Martin, Tr. Vol. 4, pp. 88-89.
    - Only 22 of Charter's 90 pole agreements in North Carolina include provisions requiring Charter to submit any kind of post-installation certification. NM Ex. 3, Table 1, pp. 1-11. Five of these agreements require certification only upon the pole owner's specific request, and no such certification has ever been requested. Martin, Tr. Vol. 4, pp. 89. All of the agreements executed by Charter since the enactment of G.S. 62-350 allow certification by an authorized representative or a construction supervisor. NM Ex. 3, Table 1. pp. 1-11.
    - EnergyUnited EMC recently signed an agreement that does not include any kind of certification requirement. South River EMC recently signed an agreement that allows submission of certification by an authorized representative. NM Ex. 3, Table 2, pp. 1-11. Clearly, if a certification by a professional engineer were considered necessary for safety purposes, or as a requirement of state law, these cooperatives would not have agreed otherwise.
    - Blue Ridge does not require a professional engineer to certify the attachments of any of its other third-party attachers, except for one, and Blue Ridge does not ever recall seeing a certification from that company. Martin, Tr. Vol. 4, p. 89; Mullins, Tr. Vol. 3, pp. 241-242.
        - Blue Ridge does not require that all attachments and overlashes by Charter's direct competitors be subject to a professional engineer certification. Mullins, Tr. Vol. 3, pp. 241-242.
        - G.S. 62-350(a) requires that all pole attachment agreements are "nondiscriminatory."
    - Blue Ridge itself does not perform a full professional engineer analysis of each and every attachment of its facilities. Booth, Tr. Vol. 3, pp. 83-84.
- The language in Charter's prior agreements with Blue Ridge requiring certification by a professional engineer was not consistent with industry standard, was not followed by the parties, and does not support Blue Ridge's stated reasons for requiring a professional engineer certification.
    - The parties have not followed the requirements of the 2008 agreement. For years Blue Ridge's technicians have requested Charter's construction personnel contact them by phone or email regarding proposed new

[1] Joint Issue List, Issue No. 3.c.

attachments, requesting only limited information related to span lengths, current facilities on the poles, and design maps. Mullins, Tr. Vol. 3, p. 229. Blue Ridge has never requested a professional engineer certification. Martin, Tr. Vol. 4, pp. 89.

Blue Ridge's Proposal is Unwarranted and Unworkable:

- Blue Ridge seeks to require a professional engineer certify Charter's installations upon its poles. As evidenced by the fact that neither Blue Ridge nor any other cooperative in North Carolina has ever insisted on certification by professional engineers related to Charter's attachments, and that Blue Ridge does not require it of other attachers who compete directly with Charter, it is clear Blue Ridge does not actually need certification for each attachment, let alone certification from a professional engineer.

Charter's Proposed Language: Charter proposes language to address Blue Ridge's contentions, providing certification upon Blue Ridge's request to verify that new attachments were made in accordance with the plans and specifications. An authorized representative is one who has adequate knowledge of and experience with the National Electrical Safety Code and any other safety and operational requirements of the parties' Agreement. If Blue Ridge has legitimate and good faith concerns, it could choose to conduct its own post-construction inspection with a professional engineer at Charter's expense.

Certification: *Upon written request from the Cooperative, no later than 30 days after Charter installs the last Attachment covered by its approved application, Charter shall send to the Cooperative a certification (the "Certification") by a Registered Professional Engineer in the State of North Carolina or an authorized representative that the Attachments are of sound engineering design and fully comply with the safety and operational requirements of this Agreement, including without limitation the National Electrical Safety Code. If Certification is not received when requested, the Cooperative may declare the Attachment to be unauthorized.*

The Commission's Prior Decisions: Charter recognizes that in its prior decisions, the Commission adopted language proposed by the cooperatives, which would allow the cooperatives to require the communications services provider (in those cases, TWC) to provide a professional engineer certificate for attachments. *See JOEMC Order* at 61-63. The Commission did not address the related issue of the need to meet the requirements in G.S. 62-350(a) of nondiscriminatory treatment. To the extent that Blue Ridge is allowed to impose any requirement on Charter of providing a professional engineer certificate, Blue Ridge may not do so in a discriminatory way and must impose a similar requirement on Charter's direct competitors who also attach to Blue Ridge's poles. The Commission should make clear that it is not requiring Blue Ridge to impose a professional engineer certification requirement and if it chooses to do so, it must impose a similar requirement on all attachers.

APPENDIX D
TRANSFERS[1]

Industry Standard:

- Across North Carolina, a majority of transfer requests are made by a phone call or email to attachers requesting the transfer of facilities on a certain pole or pole line. NM Rebuttal Ex. 3, Table 4, pp. 58-100.
- Some pole owners, including Blue Ridge, use an automated system, the National Joint Utilities Notification System ("NJUNS"), to notify all attachers and enable easier coordination of facility transfers in a timely manner. Martin, Tr. Vol. 4, p. 105.
- To ensure transfers are completed in a timely fashion, and/or the Cooperative's efforts are not unduly delayed, if a requested transfer is not timely performed, the Cooperative may transfer the facilities at Charter's expense, or terminate the permit associated with the attachment and treat it as an Unauthorized Attachment.
- Charter accepts responsibility, as it has under its existing agreement with Blue Ridge, for the actual costs incurred by Blue Ridge if it must make a special return to the job site to remove an old pole. Charter is also fully prepared to reimburse the Cooperative for the actual cost of performing any work undertaken that Charter was required to perform. Martin, Tr. Vol. 4, p. 105.
- Blue Ridge's expert Mr. Booth does not dispute that a contract provision consistent with the parties' existing agreement is reasonable. Booth, Tr. Vol. 3, pp. 99-100.
- The Commission has approved industry-standard language addressing transfer requests in its prior pole attachment orders. *JOEMC Order* at 71.

Charter's Proposed Language: Charter's proposed language is nearly identical to the language approved by the Commission in its prior pole attachment orders. *Compare JOEMC Order* at 71 *to* Martin, Tr. Vol. 4, 105-06. The only difference is that Charter seeks 60 days to transfer its attachments, instead of the 30 days approved in the Commission's prior orders. Charter's language is consistent with the parties' existing agreement and Blue Ridge did not argue that 60 days was an unreasonable requirement.

Transfers & Relocation: *The Cooperative may replace or relocate poles for a number of reasons, including without limitation when existing poles must be relocated at the request of the North Carolina Department of Transportation, another governmental body or a private landowner. In such cases, Charter shall, within 60 days after receipt of written notice, transfer its Attachments to the new poles. If such transfer is not timely performed, the Cooperative may at its option: (i) revoke the permit for the Attachment and declare it to be an Unauthorized Attachment subject to the Unauthorized Attachment fee; or (ii) transfer Charter's Attachments and Charter shall reimburse the Cooperative for the actual costs of completing such work. If Cooperative elects to do such work, it*

[1] Issue No. 3.d.

shall not be liable to Charter for any loss or damage except when caused by the Cooperative's gross negligence or willful misconduct.

APPENDIX E
NONCOMPLIANT ATTACHMENTS[1]

Industry Standard:

- Across the state of North Carolina, pole owners and attachers work together to address compliance issues as they arise.
- There is widespread agreement that attachments that are at one time compliant may fall out of compliance due to natural forces, and that all attaching parties' attachments, including Blue Ridge's, may fall out of compliance and require maintenance and correction. Martin, Tr. Vol. 4, p. 97; Mullins, Tr. Vol. 3, pp. 259-60; Layton, Tr. Vol. 1, pp. 188-90.
- Section 62-350 mandates pole owners provide attachers with written notice when facilities are found out of compliance with applicable safety rules and regulations, establishes a timeline for remedying the noncompliance, and requires all parties work cooperatively to determine the cause and effectuate the remedy for noncompliance.
- Causation and allocation of costs necessary to bring facilities into compliance should be determined cooperatively, because causation is not always provable, and all attachers, including Blue Ridge, cause violations.
    - Section 62-350 specifically requires: "All attaching parties shall work cooperatively to determine the causation of, and to effectuate any remedy for, noncompliant lines, equipment, and attachments." G.S. § 62-350(d)(4).
    - The undisputed testimony demonstrates that all attachers had noncompliant attachments. Mullins, Tr. Vol. 3, pp. 252-53; Layton, Tr. Vol. 1, pp. 188-95. On average, Charter's rate of noncompliant attachments (as a function of its total number of attachments), was comparable to other attachers, and lower than several other third-party attachers. Mullins, Tr. Vol. 3, pp. 252-53; Layton, Tr. Vol. 1, pp. 188-95.
    - Causation cannot always be determined. Violations may be caused by the Cooperative's own attachments, other attachers or natural events, wear and tear, or equipment failure. *See* Mullins, Tr. Vol. 3, pp. 254-55, 256-77.
- The National Electrical Safety Code does not require that existing facilities be brought up to the latest version of the Code, except where specifically indicated. Martin, Tr. Vol. 4, pp. 99-100.
- In its prior orders addressing pole attachment issues, the Commission approved contract language consistent with the processes and procedures for dealing with noncompliant attachments specified in G.S. 62-350. *JOEMC Order* at 69-70. The Commission also rejected proposals similar to Blue Ridge's that would allow

[1] Joint Issue List, Issue No. 3.e.

liquidated damages for noncompliant attachments. *See id.* Finally, the Commission approved language requiring compliance with the applicable safety requirements in effect at the time an attachment is made, rejecting the cooperatives' proposals in those cases (similar to Blue Ridge's proposal here) that Charter bring every attachment into compliance with the latest version of those codes, even if the attachment was compliant at the time it was made. *Id.* at 55-56.

Blue Ridge Has Agreed With Industry Standard for Decades for Other Attachers:

- Blue Ridge has consistently abided by the industry standard for other attachers, which is consistent with the requirements outlined in Section 62-350(d).
    - Blue Ridge does not require any of the telephone companies attached to its poles to pay a penalty for the discovery of noncompliant attachments. Mullins, Tr. Vol. 3, p. 242.

Blue Ridge's Proposed Language Disregards the Industry Standard and Long-Standing Practice:

- Blue Ridge proposes that the responsibility to correct noncompliance should always default to Charter, even if Blue Ridge is responsible for the noncompliance issue. *See* Layton, Tr. Vol. 1, pp. 208-09.
    - Blue Ridge's proposal plainly violates the standard of reasonableness set forth in Section 62-350(d), which requires that all parties "work cooperatively to determine the causation of, and to effectuate any remedy for, noncompliant lines, equipment, and attachments." It nowhere allows Blue Ridge to default responsibility automatically to Charter.
- Blue Ridge's effort to make it appear that Charter is responsible for a vast number of compliance issues should be seen for what it is – a litigation tactic. It cannot be determined from the photos what party is responsible in many cases, whether other attachers (including Blue Ridge) have similar issues, or how widespread any compliance issues are. Mullins, Tr. Vol. 3, pp. 254-55, 266-77; Layton, Tr. Vol. 1, 188-210.
    - Blue Ridge rushed to submit thousands of repair tickets to Charter, but not to the other attachers on its poles, with full knowledge that Charter is not the proper party to receive those tickets because it cannot perform its work until some other entity first takes action. Layton, Tr. Vol. 1, pp. 192-99.
    - Blue Ridge contracted with Mr. Booth to inspect only Charter's attachments for so-called "imminent violations," solely for purposes of this litigation. Layton, Tr. Vol. 1, pp. 197-98. Blue Ridge did not ask Mr. Booth to inspect attachments by other attachers, assumed all violations were caused by Charter, and did not provide the results to Charter until Blue Ridge filed its testimony in this case. *See id.* at pp. 197-01.

Charter's Proposed Language: Charter's proposed language for noncompliant attachments is the same language the Commission approved in its prior pole attachment orders, and is consistent with industry standard and Section 62-350. Martin, Tr. Vol. 4, p. 98.

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

Charter's proposed language for compliance with safety standards is identical to the language the Commission has previously approved, and is consistent with industry standard and the National Electrical Safety Code.

Compliance with Safety Standards: *Charter's Attachments constructed on the Cooperative's poles after the Commencement Date shall be placed and maintained at all times in accordance with the requirements and specifications of the National Electrical Safety Code, the National Electrical Code, the North Carolina Department of Transportation, the Occupational Safety and Health Act, the Rural Utilities Service, the Society of Cable Television Engineer's Recommended Practices for Coaxial Cable Construction and Testing and for Optical Fiber Cable Construction, and the operational standards developed by the Cooperative. And in all cases as such requirements, specifications, and standards may be modified, revised, supplemented or replaced from time to time, all revisions taking effect after Charter's facilities have been installed shall be treated as applying on a prospective basis, except to the extent NESC requires that a modified, revised, supplemented or replaced rule must be applied retroactively.*

APPENDIX F
INSURANCE REQUIREMENTS[1]

Industry Standard:

- Blue Ridge has not identified any industry standard or any other compelling reason why attaching entities like Charter should be required to meet the same insurance requirements imposed by Blue Ridge's lender, RUS, on the Cooperative.

Blue Ridge's Has Not Carried Its Burden:

- Blue Ridge did not submit evidence of the precise RUS requirements for insurance coverage, where those requirements are set forth, and how they would or should apply to Charter's attachments to Blue Ridge's poles.
- Charter's testimony established that the requirements of RUS for financing Blue Ridge's infrastructure do not apply to Charter. Martin, Tr. Vol. 4, p. 109.

Proposed Language: Neither party proposes language to address this requirement. Charter requests that the Commission reject Blue Ridge's complaint on this issue because Blue Ridge has failed to carry its burden to prove it is reasonable to impose the RUS insurance requirements on Charter.

[1] Joint Issue List, Issue No. 3.f.

APPENDIX G
DEFAULT REMEDIES[1]

Industry Standard:

- Most of Charter's North Carolina pole attachment agreements include remedies for default, allowing the pole owner to terminate a permit covering the poles to which the default occurred or terminate the agreement altogether after giving reasonable notice and opportunity to cure. NM Rebuttal Ex. 3, Table 5, pp. 101-136.
    - The Commission approved industry-standard default language in its prior pole attachment orders. *JOEMC Order* at 76.
- Charter's proposed language is consistent with the industry standard. Martin, Tr. Vol. 4, p. 107.
- Charter's proposed language provides more options to Blue Ridge than are contained in many other pole agreements. Martin, Tr. Vol. 4, p. 108.

Charter's Proposed Language: Charter's proposed default provision is identical to the default provision the Commission approved in its prior pole attachment orders. *Compare JOEMC Order* at 76 *to* Martin, Tr. Vol 4, pp. 107-08. Consistent with the Commission's holdings, Charter's language "clearly articulate proportionate consequences for failure to uphold the terms of the agreement, after a reasonable period of time to cure the issue." *JOEMC Order* at 76. This language allows the parties to move swiftly toward resolution should any problems arise. It also provides clarity as to the obligations and limitations of each party's responsibilities so there are fewer disputes and delays.

Defaults: *If Charter is in material default under this Agreement and fails to correct such default within the cure period specified below, the Cooperative may, at its option:*

(a) declare this Agreement to be terminated in its entirety;

(b) terminate the authorization covering the pole(s) with respect to which such default shall have occurred;

(c) decline to authorize additional Attachments under this Agreement until such defaults are cured;

(d) suspend all make-ready construction work; and/or

(e) correct such default without incurring any liability to Charter except when caused by Cooperative's gross negligence or willful misconduct, and Charter shall reimburse Cooperative for the actual costs of doing the work; and/or

(f) obtain specific performance of the terms of this Agreement through a court of competent jurisdiction.

[1] Joint Issue List, Issue No. 3.g.

For a period of thirty (30) days following receipt of notice from the Cooperative (or, for defaults of a nature not susceptible to remedy within this thirty (30) day period within a reasonable time period thereafter, Charter shall be entitled to take all steps necessary to cure any defaults. The 30-day notice and cure period does not apply to any default by Charter of its payment obligations under this Agreement.

APPENDIX H
CONFIDENTIALITY[1]

Industry Standard:

- There is no industry standard for making pole attachment agreements confidential. Martin, Tr. Vol. 4, p. 109. Charter's 2008 agreement with Blue Ridge is one of the only, if not the only, pole agreement Charter is aware of in North Carolina that is marked confidential.
    - None of the parties in the prior pole attachment cases that have come before the Commission sought to keep any element of their pole attachment agreements confidential.
- There is no "market sensitive information" in Blue Ridge's pole attachment agreements. Martin, Tr. Vol. 4, p. 109. The 2008 agreement is similar in substance to the scores of non-confidential pole agreements Charter's witness Mr. Martin summarized in his testimony.

Blue Ridge's Proposed Confidentiality Requirement Disregards the Industry Standard and Allows Discriminatory Treatment:

- The only reason Blue Ridge offered for a confidentiality provision is that the terms of its agreements are "nobody else's business." Martin, Tr. Vol. 4, p. 109; NM Rebuttal Ex. 4, at 237-38. This is not a valid reason under North Carolina law for protecting information, and would not be a basis for the Commission to withhold information under the North Carolina Public Records Act, G.S. 132-1, *et seq.*
- Blue Ridge has used the confidentiality of its agreements for years to impose discriminatory rates, terms, and conditions of attachment on Charter, in violation of G.S. 62-350. Martin, Tr. Vol. 4, p. 109; Mullins, Tr. Vol. 3, pp. 240-42. The Cooperative can offer no legitimate reason why it should be allowed to continue to mask its unfair treatment with needless confidentiality provisions.

Proposed Language: Neither party proposes language to address this requirement. Charter requests that the Commission affirm that it is unreasonable for pole owners to insist on overly broad confidentiality provisions in pole agreements, and that any confidentiality provisions should narrowly address only legitimate concerns related to market sensitive information.

[1] Joint Issue List, Issue No. 3.h.

APPENDIX I
INDEMNIFICATION[1]

Industry Standard:

- Mutual indemnification is standard in the industry. Martin, Tr. Vol. 4, p. 106.
    - At the very least, each party should be responsible for its own negligence. Martin, Tr. Vol. 4, p. 106.
- Blue Ridge has mutual indemnification provisions in virtually all of its agreements with telephone companies. Martin, Tr. Vol. 4, p. 106.
- The Commission held in its prior pole attachment orders that industry-standard mutual indemnity provisions are just and reasonable. *JOEMC Order* at 74-75.

Blue Ridge's Proposal Disregards the Industry Standard and the Compliance Issues It Has Created Involving Charter's Facilities:

- The record shows that Blue Ridge has created compliance issues involving Charter's facilities, for which it should be required to indemnify Charter. Martin, Tr. Vol. 4, p. 106; *see also* Mullins, Tr. Vol. 3, pp. 254-55, 256-77.

Charter's Proposed Language: Charter's proposed indemnity provision is identical to the provision the Commission approved in its prior pole attachment orders. *Compare JOEMC Order* at 73-74 *to* Martin, Tr. Vol 4, pp. 106.

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

[1] Joint Issue List, Issue No. 3.g.

APPENDIX J
RESERVATION OF SPACE AND RECOVERY OF SPACE[1]

Industry Standard:

Reservation of Space

- Industry standard, as embodied in virtually all agreements Charter has with other North Carolina pole owners, dictates that utilities may reserve space for their core utility purposes, but that Charter should be allowed to occupy, at least temporarily, pole space for so long as it is available. Martin, Tr. Vol. 4, pp. 102-104.
    - The Commission previously approved industry-standard contract language for reservation of space. *JOEMC Order* at 61.
- Blue Ridge cannot justify reserving substantial portions of its poles to prevent even the temporary attachment of communications facilities.
    - There is no industry standard reserving the top 8.5 or 9.5 feet of a pole as a "supply space," nor is there an industry standard reserving 72 inches between the neutral and a communications attachment.
        - Blue Ridge's expert claimed that RUS requires the "supply space" to be reserved for electric equipment, including the 72 inch separation. But he was unable on cross examination to identify specifically any such RUS requirement. Booth, Tr. Vol. 3, p. 67, 189-95.
        - Blue Ridge admitted that it has and may allow attachments to be placed within the top 8.5 or 9.5 feet of the pole, up to 40 inches from Blue Ridge's neutral, and that doing so does not violate any RUS requirement. Layton, Tr. Vol. 2, p. 34.
    - Blue Ridge's prior agreements with Charter (and agreements between Blue Ridge and other communications attachers) have never reserved an 8.5 supply space in which communications attachments could not be placed. Martin, Tr. Vol. 4, p. 101.
- The FCC permits the reservation of space as long as the utility allows for the excess space to be used by cable operators until the time the space is needed. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 ¶ 1169 (1996) ("We will permit the electric utility to reserve space if such reservation is consistent with a bona fide development plan. The electric utility must permit use of its reserved space by cable operators . . . until such time as the utility has an actual need for that space.").

[1] Joint Issue List, Issue Nos. 3.j & 3.k.

  - If the space could be reclaimed for other purposes the Cooperative "could favor itself in the provision of competitive communications and video services." Martin, Tr. Vol. 4, p. 101.
  - Blue Ridge allows its affiliate, Ridgelink, to attach to its poles to provide a dark fiber communications service that could compete with Charter. Martin, Tr. Vol. 4, p. 101.

- Reservation of space allows Charter to determine, when the pole owner's need arises, whether to pay for modifications to maintain its attachments.
  - FCC specifically endorsed this practice. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16053, at ¶ 1169 (1996) ("The utility shall give the displaced cable operator . . . the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.").
- Notification to Charter of a need to use the space is necessary to prevent "build downs" or other practices that create code and safety violations. Mullins, Tr. Vol. 3, p. 255.
  - Blue Ridge has created clearance violations when it adds transformers to a pole that already has communications attachments. Mullins, Tr. Vol. 3, pp. 269-75.
  - ***BEGIN CONFIDENTIAL*** [redacted] ***END CONFIDENTIAL*** Layton, Confidential Tr. Vol. 2, pp. 27-28.
- In its prior pole attachment orders, the Commission specifically rejected as unreasonable language proposed by other cooperatives that would allow them to "prohibit even temporary occupancy of the top 8.5 feet on a pole, even to the extent the Cooperative has no present or impending need for it." *JOEMC Order* at 60-61.

Clearance Requirements for Charter Attachments

- It is long standing practice across the industry that Charter attaches at least 40 inches below the effectively grounded neutral of the Cooperative. Martin, Tr. Vol. 4, pp. 103-104.
- The National Electrical Safety Code requirements specify 40 inches of clearance space generally required between electric and communications equipment, though allowances for less space are made for the drip loops or brackets of street lights. National Electrical Safety Code, C2-2012, Rule s235 & 238. Martin, Tr. Vol. 4, pp. 102; Booth, Tr. Vol. 3, pp. 78-79.

- Virtually every other communications attacher (other than Charter) is allowed to place its facilities within 40 inches of Blue Ridge's neutral. Martin, Tr. Vol. 4, p. 103; Mullins, Tr. Vol. 3, pp. 242-43. Charter's attachments represent only about 30 percent of the attachments on Blue Ridge's poles. Mullins, Tr. Vol. 3, pp. 242-43
    - Blue Ridge admitted that Charter and its predecessors (and other companies) have been attaching their facilities approximately 40 inches from Blue Ridge's neutral for decades, and that Blue Ridge allows that spacing today. Layton, Tr. Vol. 2, pp. 33-34. Blue Ridge further admitted that neither the attachers nor Blue Ridge violates any RUS requirement by doing so. *Id.* at p. 34
- In its prior pole attachment orders, the Commission approved language that would allow attachments at least 40 inches from the cooperative's effectively grounded neutral, with a preference (but not a requirement) of 72 inches. *JOEMC Order* at 60-61.

Blue Ridge's Proposals Are Inefficient and Violate G.S. 62-350:

- Blue Ridge's proposals would produce incredible inefficiencies and violate the access rights afforded Charter in G.S. 62-350.
    - Blue Ridge's attempt to reserve the top 8.5 feet or more of the pole for its own use – to the exclusion of even temporary communications attachments – would effectively prevent Charter from attaching to the vast majority of existing Blue Ridge poles, significant in light of the fact that the Cooperative has built its own fiber and could use it to provide competitive service. Such a proposal would effectively give Blue Ridge a green light to eliminate competition.
    - Blue Ridge's proposal to *require* 72 inches of clearance space between its facilities and the nearest communications attachment would allow it to force Charter off a pole or to install a new pole, even if Charter could make its attachment in compliance with the National Electrical Safety Code and other applicable safety requirements.
        - Blue Ridge's proposal is at odds with the industry standard and its practice of maintaining 40 inches of space below electric facilities for other communications attachers. *See* Mullins, Tr. Vol. 3, p. 243.
    - Both proposals introduce unnecessary costs and inefficiencies: they would require Charter to replace poles unnecessarily with taller poles, even where there is no expectation that the extra height will be used. Martin, Tr. Vol. 4, p. 102.
    - Both proposals appear designed ultimately to defeat Charter's right of access under G.S. 62-350 by making it economically infeasible for Charter

to make new attachments (as each new attachment would likely require a pole replacement).

Charter's Proposed Language: Charter's proposed language is identical to the language the Commission approved as just and reasonable in its prior pole attachment orders. *Compare JOEMC Order* at 60-61 *to* Martin, Tr. Vol. 4, pp. 102-03.

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

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

APPENDIX K
UNAUTHORIZED ATTACHMENTS[1]

Industry Standard:

- A penalty for unauthorized attachments is reasonable if sufficient information is gathered to determine that an attachment is truly unauthorized, and the penalty bears some relation to the actual harm suffered by the Cooperative. Martin, Tr. Vol. 4, pp. 95-96.
    - None of Charter's pole attachment agreements with North Carolina cooperatives, municipalities, or investor-owned utilities allow pole owners to seek penalties reaching back decades. Martin, Tr. Vol. 4, p. 96; NM Ex. 3, Table 3, pp. 24-57.
- Five times the current annual fee per pole is the general industry standard for unauthorized attachment penalties. Martin, Tr. Vol. 4, p. 96; NM Ex. 3, Table 3.
    - A five-year multiplier is easy and straightforward to apply. It does not require the parties to determine when an attachment was made, only whether the attachment was authorized. Martin, Tr. Vol. 4, pp. 95-96.
    - If audits are conducted every five years, a five year penalty amounts to a double payment—twice the rent that would be paid—assuming attachments are made at a steady rate, the average age of an attachment made in that five year period is 2.5 years. This penalty is proportional and a reasonable estimate of the actual harm suffered by the Cooperative.
    - No additional fees or fines are necessary, particularly if Blue Ridge conducts periodic attachment inventories, the costs of which would be covered by all attachers.
- In its prior pole attachment orders, the Commission approved provisions imposing unauthorized attachment penalties in the amount of five times the current annual fee per pole. *JOEMC Order* at 67-69.
- The FCC similarly has established a benchmark for a "reasonable" unauthorized attachment fee equal to "five times the current annual rental fee per pole." *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, ¶ 115 (2011), *aff'd sub nom. Am. Electric Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013). The FCC rejected as unreasonable an open ended penalty provision that would require payment of pole attachment fees back to the last inventory, and instead, instructed the utility to set a maximum period for the assessment of back-rent. *See Cable Television Assoc. of Ga.*, 18 FCC Rcd 22287 ¶ 22.

[1] Joint Issue List, Issue No. 3.l.

Blue Ridge Seeks Unreasonable Penalties:

- Blue Ridge seeks liquidated damages consisting of a "discovery" fee of $150 and a "daily" fee of $5 per day for unauthorized attachments. These penalties are unreasonable and unnecessary as they serve no useful purpose, and are designed as a punishment, not an estimate of the actual damages Blue Ridge would suffer.
    - Liquidated damages are permitted when they are reasonable estimates of probable damages or where they are reasonably proportionate to the actual damages caused by a breach. Penalty clauses designed as punishment or a threat to prevent a breach are not enforceable. *Eastern Carolina Internal Medicine, P.A. v. Faidas*, 149 NC. App. 940, 945-46 (2002).
    - Blue Ridge did not submit any evidence supporting a penalty of $150 per unauthorized attachment, plus a $5.00 daily fee, as a reasonable estimate of its actual damages.
    - Blue Ridge does not impose any kind of penalty on most of its third-party communications attachers. Mullins, Tr. Vol. 3, p. 242.
    - Where it does impose some sort of penalty, it has not enforced them, despite discovery unauthorized attachments by all parties in the course of its recent audit. Martin, Tr. Vol. 4, p. 97; NM Ex. 4, at 171, 223; Mullins, Tr. Vol. 3, p. 242.
- The Commission rejected attempts by the cooperatives in the other pole attachment cases to collect liquidated damages. *See JOEMC Order* at 68-69. Blue Ridge has offered no evidence that would compel a different conclusion here.

Charter's Proposed Language: Charter's proposed language is identical to the language the Commission approved as just and reasonable in its prior pole attachment orders. *Compare JOEMC Order* at 67-69 *to* Martin, Tr. Vol. 4, p. 96.

Unauthorized Attachments: *The Cooperative may assess a fee for any Charter Attachment that has not been authorized in accordance with this Agreement ("Unauthorized Attachment"). The fee for Unauthorized Attachments shall be equal to five (5) times the current Annual Attachment Fee.*

APPENDIX L

L1

Folo - Decision

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Applications - ROR

Before the
Federal Communications Commission
Washington, D. C. 20554

2152

In the Matter of	)	
Trenton Cable TV, Inc.	)	
Complainant	)	
v.	)	File No. PA-81-0037
Missouri Public Service Company	)	
Respondent	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1982; Released: February 12, 1982

By the Chief, Common Carrier Bureau:

1. Before the Bureau, pursuant to delegated authority, is a complaint filed under Section 224 of the Communications Act, 47 U.S.C. §224, by Trenton Cable TV, Inc. ("Trenton"), alleging that the Missouri Public Service Company ("MPS") has imposed unjust and unreasonable rates for cable television pole attachments. That section empowers the Commission to adjudicate attachment rate disputes between cable television system operators and telephone and electric utilities. After consideration of the pleadings, we conclude that MPS in fact charges unjust and unreasonably high rates, and, moreover, that a refund is warranted.

2. Trenton owns and operates a cable television system serving Trenton, Missouri. Pursuant to a contract dated February 2, 1965, Trenton has attached distribution facilities to approximately 780 poles.

3. Using information provided by MPS and applying the formula established by Section 1.1409(c) of the Commission's Rules, 47 C.F.R. §1.1409(c), Trenton calculates that the maximum just and reasonable rate is $2.14 per attachment. It therefore urges us to substitute this lower rate for the $3.50 rate contained in the contract and, further, to order appropriate refunds. MPS, by contrast, argues that a rate of $3.09 is fully justified under the pole attachment rate formula.

4. Section 1.1409(c) of the Commission's Rules, 47 C.F.R. §1.1409(c), provides that the maximum "just and reasonable" rate for pole attachments is to equal the percentage of the total usable space occupied by the pole attachment times the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. This rule, expressed as a formula, is as follows:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \left(\text{Operating Expenses} + \text{Capital Costs of Poles} \right)$$

Though the parties are in agreement that space occupied by CATV is one foot and total usable space is 12.67 feet 1/, they differ on certain issues involving operating expenses and capital costs of poles.

5. Operating Expenses and Capital Costs of Poles. The only formula element to be determined is operating expenses and capital costs of poles. Although operating expenses and capital costs of poles (also known as "carrying charges") can be expressed directly as dollar amounts, these costs may also be expressed as a percentage of net pole investment. 47 C.F.R. §1.1404(g)(9). Thus, the operating expenses and capital costs of poles normally are determined from the net cost of a bare pole and the carrying charges attributable to the cost of owning a pole.

6. Net Cost of a Bare Pole. Using information provided by MPS, Trenton calculates net cost of a bare pole by first subtracting depreciation reserve ($10,249,605) from the gross investment in pole lines ($30,971,209) and reducing this figure by $3,815,711 2/ to account for crossarms and other hardware unessential for CATV use.

1/ MPS submitted a study supporting its use of 12.17 feet to represent total usable space. Trenton revised this figure to add .5 feet to represent the upper six inches of pole space which MPS excluded in its study. MPS has registered no objection, and this revision comports with the Commission's prior decisions.

2/ The hardware reduction was arrived at by converting the gross figures submitted by MPS into a net figure as follows:

Crossarm Investment	-	$ 3,910,055 (gross)
Other Non-CATV Hardware	-	$ 1,793,036 (gross)
Total Non-CATV Hardware		$ 5,703,091 (gross)

$$\text{Net Investment in Non-CATV Hardware} = \$5{,}703{,}091 \times \frac{\$20{,}721{,}604 \text{ (Net Pole Investment)}}{\$30{,}971{,}209 \text{ (Gross Pole Investment)}}$$

$$\text{Net Investment in Non-CATV Hardware} = \$3{,}815{,}711$$

Trenton then divided the resulting "net investment in pole line" ($16,905,893), by the total number of poles owned by MPS (153,878), to arrive at $109.87 as the net cost of a bare pole.

7. The sole objection MPS has to Trenton's calculations is that Trenton has reduced the net investment in pole lines by $3,815,711 instead of $3,040,031. MPS first submitted this latter, revised figure in its answer to Trenton's complaint. MPS explains that the higher figure used by Trenton, which was obtained from data MPS submitted in response to Trenton's information request, is in truth the result of a mathematical error initially made by MPS. 3/ It further explains that its original calculations were based on only a portion of the poles in Account 364.1 and that some of the expenses included therein were proper expenses for CATV attachments, but applied to poles not included in the original analysis. Its position is that the only items properly excludable are transformer platforms and crossarms, which total $3,040,031. 4/

8. Initially, we cannot agree with MPS that the only items properly excludable as non-cable associated hardware are crossarms and transformer platforms. In fact, we have repeatedly found that such adjustments should include, inter alia, transformer racks and platforms, racks complete with insulators, brackets, extension arms, head arms, guards, insulator pins, suspension bolts, and railings. See, e.g., Teleprompter Corp. v. Washington Water Power Company, Mimeo No. 002678 (released August 12, 1981) and Teleprompter v. Tampa Electric Company, Mimeo No. 1127 (released December 16, 1981). Therefore, we must reject MPS's revised adjustment figure. On the other hand, we would observe that MPS's original figure appears to include the other non-cable associated hardware. Although MPS contends that there was a mathematical error in its calculations, and that the figure included some items useful to CATV, it has failed to identify the mathematical error or specify the items improperly included. In these circumstances, where MPS has not provided the data necessary to correct its original figure, that figure must be adjudged the best available, and we will use it to calculate the non-cable hardware adjustment. Thus, we will accept

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3/ MPS has filed a motion to accept a supplement to its earlier response to Trenton. There, it seeks to explain, among other things, this discrepancy. Though Trenton has registered its opposition, we will nonetheless accept the supplement in the interest of developing a full and complete record on the point.

4/

Transformer Platforms	-	$ 633,407(gross)
Crossarms	-	$3,910,055(gross)
Total	-	$4,543,462(gross)
Less Depreciation Reserve	-	$1,503,431
Net Non-CATV Hardware	-	$3,040,031(net)

the $109.87 figure calculated by Trenton to represent net cost of a bare pole.

9. Carrying Charges. Both parties have agreed upon the carrying charges figures for taxes, (6.51 percent) and depreciation (4.71 percent). They do not agree, however, on the figures for maintenance expense, administrative expense, and cost of capital, each of which will be discussed below.

10. Maintenance Expense. Trenton has calculated 4.22 percent for maintenance expense by dividing overhead line maintenance expense (Account 593) by the sum of the utility's gross investment in poles, towers and fixtures (Account 364), overhead conductors (Account 365), and services (Account 369), and converting the result to a net figure. 5/ In addition to these accounts, MPS's calculations of maintenance expense also include Accounts 583 (miscellaneous distribution expenses), 588 (overhead line expenses), 589 (rents) and 590 (maintenance supervision and engineering expenses), for a total maintenance expense of 5.51 percent. 6/

11. We reject MPS's argument that the additional accounts should be included in the maintenance expense. Those accounts all have a very minimal relation, if any, to pole attachments and therefore we will not include them in the calculation of the maintenance expense. The methodology proposed by Trenton, however, comports with that used by the Commission in past decisions. See, e.g., Teleprompter v. Florida Power & Light Co., Mimeo No. 002905 (released July 14, 1981) and Tower Cablevision, Inc. v. Kentucky Power Company, Mimeo No. 003601 (released September 29, 1981), at n. 7. Therefore, we will use the 4.22-percent figure as the proper maintenance expense figure.

12. Administrative Expense. In its complaint, Trenton calculated administrative expense by dividing MPS's total administrative and general expenses ($5,970,047) by the net investment in electric plant in service to arrive at 2.41 percent. In its reply, however, Trenton revised this figure to 1.13 percent by including only Accounts 920 (administrative and general salaries), 921 (office supplies and expenses), 922 (credit for administrative expenses transferred) and 928

5/ Trenton's maintenance expense (ME) calculations:

$$ME = \frac{\$1,809,009}{\$30,971,209 + \$21,833,741 + \$11,290,601} \times \frac{\$30,971,209}{\$20,721,604}$$

$$ME = .0282253 \times 1.4946337 = .0421864$$

$$ME = 4.22\%$$

6/ In the supplemental pleadings, MPS limits its discussion to Account 589. However, it has not recalculated its maintenance expense figure to reflect that the other accounts have been excluded.

(regulatory commission expense). It explains that this is the method approved by the Commission. MPS has objected to this revision, maintaining that since it accepted the figure formerly submitted by Trenton, Trenton should not be allowed to revise that figure. Since Trenton's revised calculation of administrative expense comports with the methodology used by the Commission in past decisions, we will use that figure as the administrative expense component in the carrying charges. See, Cablecom-General, Inc. v. Central Power & Light Company, Mimeo No. 000029 (released October 15, 1981), at para. 10.

13. Cost of Capital. In its data response, MPS submitted a weighted "cost of money" of 10.52 percent and a "return on equity" of 15 percent, based on an order of the Missouri Public Service Commission ("Missouri Commission") in Case ER-81-85 (order dated May 27, 1981). In its complaint, Trenton used the 10.52-percent figure as the authorized rate of return. MPS contends, however, that the 15-percent return on equity is the appropriate rate of return. Trenton rejects this figure, pointing out that the rate of return considers the cost of debt as well as the cost of equity. Moreover, it argues, the order referred to by MPS does not establish an authorized rate of return, but, rather, authorizes a $19,740,264 increase in electric revenues agreed to in a settlement between MPS and the staff of the Missouri Commission. That order, Trenton contends, in no way effects the 9.66 percent authorized rate of return, which was established by the Missouri Commission in the last contested rate case, ER-80-118, on September 2, 1980.

14. After careful review of the pleadings, we are pursuaded that the most recent authorized rate of return set by the Missouri Commission is 9.66 percent. The order cited by MPS authorizes an increase in rates based on a settlement between MPS and the Missouri Commission. The 10.52 percent weighted "cost of money figure" and the 15-percent "return on equity" figure submitted by MPS in its data response do not appear in this order. Nor does the order announce a new rate of return; indeed, the stipulation specifies that it "represents a negotiated dollar settlement for the sole purpose of disposing of Case No. ER-81-85 and none of the parties [to the agreement] shall be prejudiced or bound by the terms . . . in any future proceedings." Since there is no way to determine what, if any, part of the $19,740,260 authorized increase is due to an increase in the rate of return, we must rely on the latest authorized rate of return of 9.66 percent and will use that figure as the cost of capital component of the carrying charges. 8/

8/ We note that the rate of return is based on the cost of money, including debt, not just the return on equity.

15. In summary, adopting the figures proposed by Trenton, we calculate the total carrying charges to be 26.23 percent.

Taxes	6.51%
Depreciation	4.71%
Administration	1.13%
Maintenance	4.22%
Rate of Return	9.66%
Total	26.23%

16. Maximum Rate. By inserting the values developed in paragraphs 4-15 into the formula, as follows, we calculate that the maximum rate per attachment is $2.27.

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Cost of a Bare Pole} \times \text{Carrying Charges}$$

$$\text{Maximum Rate} = \frac{1 \text{ Foot}}{12.67 \text{ Feet}} \times \$109.87 \times 26.23\% = \$2.27$$

17. Under Section 224 of the Act and our underlying rules, $2.27 per pole attachment per year is thus the maximum just and reasonable rate MPS may charge. As noted, however, it has been charging $3.50 per attachment annually during the period covered by this complaint. The conclusion is inescapable, therefore, that MPS's rates are unjust and unreasonable within the meaning of the Act.

Remedies

18. Where, as here, substantial overcharges are established by the record, a refund of excess payments retroactive to the date of the filing of the complaint, plus interest, is proper. For the same reasons described in Cable Information Services, Inc. v. Appalachian Power Company, 81 FCC 2d 383 (1980) (C.I.S.), we are ordering a refund reflecting the difference between the $2.27 rate and the $3.50 rate currently being charged Trenton for all payments in excess of the $2.27 rate made since June 30, 1981 (the date Trenton filed its complaint), as specified below. See discussion in C.I.S., 81 FCC 2d at 392-93.

19. In addition, the Commission has determined previously that the current interest rate for federal tax refunds and additional tax payments is the appropriate rate of interest on the overcharges. See Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, 79 FCC 2d 232, 238-39 (1980). It has also taken official notice that the Commissioner of Internal Revenue has set a rate of 20 percent per year effective February 1, 1982, thereby increasing the rate from 12 percent. Rev. Rul. 81-260, (981-44 I.R.B. 19).

20. Accordingly, we will apply a 12-percent interest rate on overpayments held by MPS for the period from the filing date of the complaint until January 31, 1982. An annual interest rate of 20 percent will then be imposed from February 1, 1982, until the payment of the refunds by MPS.

Ordering Clauses

21. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.1401-1413 of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1401-1413, That the complaint of Trenton Cable TV, Inc., IS GRANTED to the extent indicated above.

22. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(a) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(a), That the existing annual rate of $3.50 for each pole attachment arising out of the agreement between Trenton Cable TV, Inc., and the Missouri Public Service Company IS TERMINATED, effective upon the release of this Order.

23. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(b) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(b), That an annual rate of $2.27 for each pole attachment IS SUBSTITUTED for the existing rate in the contract described in paragraph 22, effective upon release of this Order.

24. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(c) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(c), That the Missouri Public Service Company SHALL REFUND, within thirty (30) days of release of this Order, to Trenton Cable TV, Inc., excess payments made since June 30, 1981. These excess payments for which a refund is ordered consist of the difference between the payments made and payments based on the maximum annual rate of $2.27 per attachment. This refund shall consist of the excess portions included in the first payment due January 1, 1981 (prorated from June 30, 1981) and all subsequent payments made after that date.

25. IT IS FURTHER ORDERED, That the refund shall bear interest at an annual rate of 12-percent simple interest from the filing date of the complaint through January 31, 1982, and at an annual rate of 20-percent simple interest from February 1, 1982, until the date of full payment to the complainant.

FEDERAL COMMUNICATIONS COMMISSION

Gary M. Epstein
Chief, Common Carrier Bureau

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Pike surveys.
log/file
Cost. for Pike survey

Before the
Federal Communications Commission
Washington, D. C. 20554

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In the Matter of	)	
	)	
Hobbs Cablevision Inc., and	)	
JAL CATV Corp.	)	
Complainants	)	
	)	
v.	)	File No. PA-81-0003
	)	
General Telephone Company of	)	
the Southwest	)	
Respondent	)	

MEMORDANDUM OPINION AND ORDER

Adopted July 26, 1983; Released August 2, 1983

By the Chief, Common Carrier Bureau:

1. Before the Bureau is General Telephone Company of the Southwest's (General) petition for reconsideration of a Memorandum Opinion and Order entered by the Acting Chief, Common Carrier Bureau, pursuant to delegated authority, Mimeo No. 001890, released June 20, 1981 (hereafter Order), which granted a complaint by Hobbs Cablevision Inc. and JAL CATV Corporation (collectively Cablevision) under Section 224 of the Communications Act, 47 U.S.C. §224. General alleges error in certain Bureau calculations and asks us to modify the Order accordingly. General now suggests a rate of $2.92 per pole attachment instead of the $1.36 rate we found just and reasonable below. For the reasons discussed in the following paragraphs, we grant the petition in part on the issue of total usable space and deny it as to the remainder of the issues.

Background and Contentions

2. In the Order, the Bureau determined that General imposed unjust and unreasonable annual rates for pole attachments. When the complaint was filed, General was charging $3.00 for each pole attachment. Cablevision advocated a rate of $0.93. Using information supplied by General, the Bureau calculated the maximum annual rate to be $1.36 and directed General to refund, with interest, excess payments

made by Hobbs since the filing of the complaint. No refund was ordered for JAL because it had not paid rentals for the period covered by the complaint.

3. In its petition, General alleges three errors in the Order. First, General argues the Bureau improperly rejected its figure for average usable space. Second, General asks that in calculating the carrying charges, we use its current rate of return rather than the one in effect at the time the pleadings were filed. Third, General contends the Bureau should order Cablevision rather than General to bear the costs of the latter's pole survey. Cablevision supports the Bureau's Order and urges denial of General's petition.

4. Total Usable Space. General maintains that we should accept its pole survey supporting its total usable space figure. General argues that, contrary to the Bureau's finding, it counted only those poles used for cable attachments and that it did not subtract the safety space from the height of the pole to determine usable space. General now accepts the use of 18 feet of ground clearance, although in the complaint it had advocated the use of 20 feet of ground clearance. Cablevision does not dispute General's claims regarding the poles counted in its pole survey and the safety space treatment, but it argues that General erred in using a "responsibility factor" to represent the amount of total usable space.

5. We find the data supplied by General from its pole survey supports its claim that only poles used for attachments were counted and that it included the safety space in its calculation of usable space. Although General conducted a valid pole survey, we cannot, however, accept its conclusion as to average usable space per pole because it failed to use proper calculation methods. 1/ Usable space should be calculated by multiplying the number of poles of each height times the amount of usable space for that height pole and dividing the product by the total number of poles bearing attachments. See, Cablecom-General Inc. v. General Telephone Co. of the Southwest, Mimeo No. 388, released November 5, 1981; Second Report and Order in CC Docket No. 78-144, 72 FCC 2d 59,69 (1979).

6. While the Commission does not generally encourage surveys, it will accept them instead of the 13.5 foot usable space average where, as here, the actual figures are available and are not otherwise challenged. This is appropriate here because General's survey reveals it has a large number of short poles (35 feet and less). See Williamsburg Cablevision v. Carolina Power and Light Co., Mimeo No. 1961, released January 26, 1983. However, although we accept the pole

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1/ General calculated a "responsiblity factor" by first determining the percentage of poles of each height and determining the percentage of usable space of each pole height occupied by CATV. It then multiplied these two percentages together to obtain a "weighted average." Finally, General added the "weighted averages" to obtain the "CATV responsiblity factor."

height data from General's study, we must recalculate the amount of usable space because, as mentioned above, General has used an improper method. 2/ Accordingly, we compute the usable space to be 9.93 feet. 3/

7. Carrying Charges. General also disputes the cost of capital component of the carrying charges. The utility contends that we incorrectly used a rate of return of 8.02 percent instead of 11.5 percent. It is undisputed that the 8.02 percent figure was in effect in January 1981 when the pleadings in this case were filed. On June 1, 1981, however, the New Mexico State Corporation Commission increased General's rate of return to 11.5 percent. The Bureau's Order was adopted on June 24, 1981 and released June 30, 1981. However, as Cablevision correctly points out, the Bureau was not notified of this change until July 17, 1981 when General filed its petition for reconsideration.

8. In these circumstances, our use of 8.02 percent cannot be said to have been in error. In normal practice, the Commission utilizes the data before it at the time the decision is rendered. If the parties wish to submit revised data prior to a decision, they must request leave to update their pleadings. Here, no such leave was requested by petitioners nor is any explanation given as to why the later information on rate of return could not have been proffered prior to July 17,

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2/ As a separate matter, we will also adjust General's figures for the setting depth and ground clearance for each particular pole height. The Commission generally subtracts 6 feet for setting depth and 18 feet for ground clearance for 25-,30-,35-, and 40-foot poles and 23 feet for ground clearance for 45-foot poles. It would be inappropriate to require General to reduce its proposed ground clearance figure from 20 to 18 feet on its 30-, 35-, and 40-foot poles, but not recognize that it has not subtracted the maximum ground clearance on 45-foot poles.

3/

Pole Size	No. of Poles	Usable Space in Feet	Feet of Usable Space
25'	212	1	212
30'	182	6	1092
35'	817	11	8987
40'	265	16	4240
45'	21	16	336
	1497		14867

$$\text{Usable Space} = \frac{\text{Total Feet of Usable Space}}{\text{Total No. of Poles}}$$

$$\text{Usable Space} = \frac{14867}{1497}$$

Usable Space = 9.93 feet

1981. When the parties do not revise their submission, the Commission uses the latest acceptable information supplied in the pleadings. Teleprompter of Fairmont Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, 79 FCC 2d 232, aff'd., 85 FCC 2d 243, 249 (1981). Accordingly we cannot accept this late-filed information and will continue to use the 8.02 percent rate of return in our modification of the maximum just and reasonable rate. 4/

9. Cost of the Pole Count Survey. The remaining issue is whether General should bear the cost of its pole survey . General cites the Second Report and Order, in CC Docket No. 78-144, supra, at 72, in support of its claim that Cablevision should pay for the study because it is a "non-recurring cost" which is an expense specifically attributable to CATV attachments or facilities. Petitioner misinterprets that decision. The portion of the Second Report referred to by General does not address the issue of pole surveys but of costs expended by the utility to prepare the poles for CATV attachments. Moreover, the Commission specifically found in the Second Report, supra at 69, that if a utility chooses to conduct a pole survey, it must bear the cost. Accordingly, we affirm our finding that General must pay for its pole survey. 5/

10. Maximum Rate. By inserting the revised figures into the formula, as follows, we compute a maximum rate per attachment of $1.84 rather than the $1.36 rate we calculated in the Order at paragraph 19.

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Cost of a Bare Pole} \times \text{Carrying Charges}$$

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{9.93} \times \$44.69 \times 40.97\%$$

$$\text{Maximum Rate} = \$1.84$$

4/ The parties may, of course, negotiate a new rate for CATV attachments based on more recent data.

5/ In the Order, at paragraph 18, we rejected General's claim that Cablevision should bear the cost of the pole survey on the basis that it is a "special cost study" for which the party requesting the study should bear the cost. General correctly points out that a pole survey is not a special cost study. A special cost study is a detailed analysis of the cost and expense items used by a utility to justify its rates. Notice of Proposed Rulemaking in Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, 68 FCC 2d 2, 9-10 (1978). However, for the reasons cited above, we reject General's assertion that Cablevision should be charged for the pole survey.

Remedies

11. In the Order we directed General to refund to Hobbs the difference between the $1.36 rate we found just and reasonable and the $3.00 rate, then in effect. No refund was ordered for JAL because it had not paid rentals for the period covered by the complaint. However, we advised JAL to pay for service received since the filing of the complaint at the $1.36 rate. Order, para. 21.

12. Adjusting the rate from $1.36 to $1.84 obviously reopens the question of refunds. Assuming that General already made refunds based on the $1.36 rate, we will order Hobbs to return whatever excess refunds it has received, reflecting the difference between the $1.36 rate and the corrected $1.84 rate. We will apply the appropriate rate(s) of interest on any excess funds held by Hobbs for the period from the date of payment of the original refunds by General until repayment of the excess refunds by Hobbs. Moreover, we will permit General to bill JAL for the additional amount owed for services received, plus interest. 6/

reverse refund Order (CATV to telco)

ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that the petition for reconsideration of the Memorandum Opinion and Order of the Chief, Common Carrier Bureau, Mimeo No. 001890, released June 30, 1981, filed by General Telephone Company of the Southwest IS GRANTED to the extent indicated above and otherwise DENIED.

6/ The following are the appropriate rates of interest for pole attachment refunds:

interest table

Time Period	Rate of Interest	Source
Date of Order through January 31, 1982	12 percent simple interest	Rev. Rul. 79-365, 79-45, I.R.B. 16
February 1, 1982, through December 31, 1982	20 percent simple interest	Rev. Rul. 81-260, 1981-44 I.R.B. 19
January 1, 1983 through June 30, 1982	16 percent simple interest	Rev. Rul. 82-182, 1982-44 I.R.B. 9
July 1, 1983 until the date of repayment of excess funds	11 percent simple interest	Rev. Rul. 83-76, 1983-18 I.R.B. 37

See Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, 79 FCC 2d 232, 238-39, (1980), for discussion of the appropriate rate of interest on overcharges.

14. IT IS FURTHER ORDERED that the maximum annual rate of $1.36 for each pole attachment ordered in the above referenced Memorandum Opinion and Order, paragraphs 26 and 27, IS VACATED.

15. IT IS FURTHER ORDERED That a just and reasonable rate of $1.84 IS SUBSTITUTED for the existing rate in the contracts described in the above referenced Memorandum Opinion and Order at paragraphs 2 and 25.

16. IT IS FURTHER ORDERED That Hobbs Cablevision Inc. SHALL REMIT to General Telephone Company of the Southwest, excess refunds, if any, with interest, as discussed in paragraph 12 above.

FEDERAL COMMUNICATIONS COMMISSION

Jay L Witt for

Jack D. Smith
Chief, Common Carrier Bureau

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Before the
Federal Communications Commission
Washington, D. C. 20554

CC
FCC 83-468
33920

In the Matter of	)	58067
Teleprompter Corporation d/b/a Teleprompter of Lovington	)	
and	)	
Southwest Video Corporation	)	File No. PA-80-0016
Complainants	)	
V.	)	
General Telephone Co. of the Southwest	)	
Respondent	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1983 Released: October 24, 1983

By the Commission:

1. Before the Commission is General Telephone Company of the Southwest's (General) application for review of a Memorandum Opinion and Order entered by the Acting Deputy Chief, (Operations) Common Carrier Bureau, pursuant to delegated authority, Mimeo No. 001985, released July 14, 1981 (hereinafter Order), which granted a complaint by Teleprompter Corporation and Southwest Video Corporation under Section 224 of the Communications Act, 47 U.S.C. §224. General alleges error in certain Bureau calculations and asks us to modify the Order accordingly or remand to the Bureau for further consideration. For reasons discussed in the following paragraphs, we deny the application.

Background and Contentions

2. In the Order, the Bureau determined that General imposed unjust and unreasonable annual rates for pole attachments. When the complaint was filed, General was charging $3.00 per attachment for those in place as of July 22, 1977, and $5.00 for all attachments made thereafter. The complainants advocated rates of $1.20 per attachment in

Texas and $1.12 per attachment in New Mexico. Using data supplied by the parties, the Bureau calculated the maximum annual rates to be the same as those advanced by the complainants and directed General to refund, with interest, the complainants' excess payments made for service provided since the filing of the complaint.

3. In its application, General argues that the Bureau erred in its rejection of General's figures for average usable space and net cost of a bare pole. Specifically, as to usable space, it maintains that the Bureau should not have rejected its figures calculated from the lengths of all poles located in cities in Texas and New Mexico. In addition, General advocates the use of 20 feet of ground clearance. General contends that in rejecting its figures for usable space, the Bureau adopted a rigid approach to pole attachment disputes rather than the flexible attitude anticipated by Congress. General also claims the Bureau should have accepted its proposed cost of a bare pole since its figure, based on investment inside cities, reflects investment in poles used for CATV more accurately than the Commission's method. The complainants ask that we affirm the Bureau's Order and deny the application for review.

4. The Commission's regulatory scheme offers utilities the option of using 13.5 feet as the average usable space per pole or presenting a weighted average reflecting the number of poles of the various heights in its distribution plant used for cable attachments. See Section 1.1404(g)(11) of the Commission's Rules, 47 C.F.R. §1.1404(g)(11); Memorandum Opinion and Order in CC Docket No. 78-144, 77 FCC 2d 187, 192-3, (1980); Cable Information Services v. Appalachian Power Co., 81 FCC 2d 383, 385 (1980). Although General alleges that it has complied with this latter option, it has ignored the requirement that the data gathered from its records must consist of only those poles used for pole attachments. Instead, it submitted a count of all poles inside cities in the two states. Not only was this count rejected below because it included all poles instead of just those bearing attachments, but also because the geographic scope of its data was unacceptable. 1/

1/ General not only conducted an improper study but its calculations do not result in the average space per pole. General uses a "responsibility factor" for total usable space. It first determined the percentage of poles of each height and then determined the percentage of usable space of each pole height occupied by CATV. Next General multiplied these two percentages together to obtain a "weighted average." Finally, it added the "weighted averages" to obtain the "CATV responsibility factor." The Bureau rejected a prior attempt by General to use this methodology and we reject it here for the same reasons. See Hobbs Cablevision Inc. and JAL CATV Corporation v. General Telephone Company of the Southwest, Mimeo No. 5580 released August 2, 1983.

58069

5. The Commission has determined that pole height and usable space vary with the presence or absence of CATV attachments. Therefore, restricting calculation of usable space to poles actually bearing attachments avoids unfair skewing of the result by the inclusion of irrelevant or uncharacteristic data. See, Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, 79 FCC 2d 232 (1980), aff'd., 85 FCC 2d 243, 24546 (1981). See also, Communications Properties Inc. v. General Telephone Company of the Southwest, Mimeo No. 36269, released September 24, 1980, aff'd., FCC 81-489, released October 27, 1981. It is also well established that the geographic area of this study must comprise either the entire company, state or community in question, not just urban poles. See, Teleprompter Corp. v. General Telephone Co. of the Southeast, Mimeo No. 001867, released July 8, 1981; Communications Properties, Inc., supra. General continues to count all poles within cities in the two states and therefore its study remains flawed.

6. We now address General's argument concerning ground clearance. A utility may use a figure other than the 18 foot standard, but it must document the variance. CC Docket No. 78-144, supra, at 193. General, however, has not provided any new or additional information to support its claim of 20 feet for ground clearance instead of 18 feet. It merely reiterates that its company practice is to allow 20 feet for clearance above grade. It has not shown that the minimum ground clearance required in the communities is unusual as to require a deviation from the standard ground clearance. The Bureau rejected this figure in the Order for lack of such documentation. Accordingly, we affirm the Bureau's use of 13.5 feet as the average usable space.

7. In response to General's claim that we have adopted a rigid approach toward pole attachment disputes, the complainants point out that the Commission has maintained a "flexible attitude" and has accepted figures other than the 13.5-foot average usable space and 18-foot average ground clearance. The Commission has indeed accepted other figures provided that they were submitted in conjunction with a properly conducted study. See, e.g., Teleprompter Corp. v. Mountain States Telephone and Telegraph Co., Mimeo No. 001869, released July 9, 1981; Cablecom-General, Inc. v. General Telephone Co. of the Southwest, Mimeo No. 388, released November 5, 1981; Liberty TV Cable v. Gulf Utilities, Mimeo No. 000765, released May 8, 1981; Teleprompter of Fairmont, supra; Second Report and Order in CC Docket No. 78-144, 72 FCC 2d 59, 69 (1979); Sections 1.363 and 1.1409(a) of the Rules, 47 C.F.R. §§1.363, 1.1409(a). General's methodology, however, does not meet the standards of the Commission's Rules and prior decisions. Therefore, the Bureau had no choice but to reject its pole study.

8. Net Cost of a Bare Pole. General also alleges that the Bureau erred in rejecting its figure for the net cost of bare poles in Texas and New Mexico. General maintains that its investment in poles inside cities more closely relates to its actual investment in the poles

used for CATV attachments than would its statewide investment, since all of complainants' pole attachments are "inside cities". 2/

9. The Commission has consistently calculated the net cost of a bare pole by dividing the gross investment in poles, either companywide or statewide (minus depreciation and items not essential for CATV attachment), by the total number of poles owned by the utility in the appropriate geographical area. General's method of using only poles located in cities does not conform to our regulations or decisions. Teleprompter Corp. v. New England Telephone and Telegraph Company of New Hampshire, Mimeo No. 002016, released July 14, 1981, Teleprompter Corp. v. Washington Water Power Company, Mimeo No. 002678, released August 12, 1981; Section 1.1404(g)(5) of the Rules, 47 C.F.R. §1.1404(g)(5). We use pole investment figures based on all poles, in calculating net cost of a bare pole, because annual carrying charges are based on all poles. Since the pole investment figure is used only as a means of expressing carrying charges, not, as argued by General, to determine the investment in poles used for CATV, it should be based on the same universe as the carrying charges. See, Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, supra at 245-46. Therefore, we affirm the Bureau's finding that the net cost of a bare pole is $44.24 in Texas and $41.15 in New Mexico.

10. Accordingly, IT IS ORDERED, That the application for review of Memorandum Opinion and Order, Mimeo No. 001985, released July 14, 1981, filed by General Telephone Company of the Southwest IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM TRICARICO
SECRETARY

2/ General's data for its pole investment in Texas and New Mexico appears to include all poles in these states. Its data for poles with attachments in selected cities omit Texarkana, Texas. However, since we reject data for selected cities as inconsistent with Commission precedent, it is immaterial that the investment figures for poles inside cities exclude Texarkana, Texas.

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Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)	
	)	
Teleprompter Corporation and	)	
Teleprompter of Grapevine, Inc.	)	
Complainants	)	
	)	
v.	)	File No. PA-81-0024
	)	
General Telephone Company of	)	
the Southwest	)	
Respondent	)	

1867

MEMORANDUM OPINION AND ORDER

Adopted January 18, 1983 ; Released January 19, 1983

By the Chief, Common Carrier Bureau:

1. Before the Bureau is General Telephone Company of the Southwest's (General) petition for reconsideration of a Memorandum Opinion and Order entered by the Chief, Common Carrier Bureau, pursuant to delegated authority, Mimeo No. 138 (released October 23, 1981) (hereinafter Order), which granted in part a complaint by Teleprompter Corporation and Teleprompter of Grapevine, Inc. (Teleprompter) under Section 224 of the Communications Act, 47 U.S.C. §224. General alleges error in our calculation of total usable space and asks us to modify the Order accordingly. For reasons discussed below, we deny the petition.

2. In the Order, the Bureau determined that General imposed unjust and unreasonable annual rates for pole attachments. When the complaint was filed, General was charging $5.00 for each attachment. Teleprompter advocated rates of $1.10 per attachment. Using data supplied by General, the Bureau calculated the maximum annual rate to be $1.11 and directed General to refund, with interest, Teleprompter's excess payments made since the filing of the complaint.

3. In its petition, General objects to our rejection of its figures for total usable space. General had calculated this figure based on a pole survey which considered all poles in Grapevine, Texas, rather than limiting its study to those poles actually used for attachments. General contends that it counted all poles because at the time it prepared its response to the complaint, no pole attachments had been made in Grapevine.

4. In the Order, fn. 1, we stated that the lack of attachments did not preclude a valid study and suggested that General could have used applications to attach submitted by the cable company as a basis for its study. In its petition, General contends that

applications to attach are an unreliable basis for a pole survey. It maintains that many attachments are made either before applications are made or, in some cases, without application. Accordingly, General maintains that it had no alternative but to submit a study of all poles in Grapevine.

5. Teleprompter responds that we should affirm our decision to reject General's pole survey. General has not cured the critical defect in its study. While Teleprompter recognizes that General cannot count poles with attachments if no attachments have been made, it argues that under the circumstances the 13.5 foot-figure should be used in lieu of the pole survey. 1/

6. We agree with Teleprompter that General did not submit an acceptable pole study to determine actual usable space. The Commission's Rules clearly require that a pole survey to measure usable space be limited to those poles actually bearing attachments. Section 1.1404(g)(11) of the Rules, 47 C.F.R. §1.1404(g)(11). See also Teleprompter of Fairmont Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, 79 FCC 2d 232 (1980), aff'd 85 FCC 2d 243 (1981); Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, 68 FCC 2d 1585, recon. 72 FCC 2d 59, 69 (1979). Since General's study admittedly comprised all poles in the community, its proposed usable space figure must be rejected. Therefore, absent a reliable pole survey showing a contrary result, we find that the only acceptable figure for total usable space is 13.5 feet.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration of Memorandum Opinion and Order, Mimeo No. 138, released October 23, 1981, filed by General Telephone Company of the Southwest IS DENIED.

FEDERAL COMMUNICATIONS COMMMISSION

Theodore D. Kuner
for Gary M. Epstein
Chief, Common Carrier Bureau

1/ Section 1.1404(g) of the Rules, 47 C.F.R. §1.1404(g)(11), provides that a party may submit 13.5 feet for the usable space figure instead of the actual measurement.

CERTIFICATE OF SERVICE

I certify that a copy of Charter Communications Properties, LLC's Post-Hearing Brief and Appendices has been served by electronic mail on counsel of record in this proceeding.

This 4th day of April, 2018.

/s/ Marcus Trathen
Attorney for Charter Communications Properties, LLC