

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

BLUE RIDGE ELECTRIC	)	
MEMBERSHIP CORPORATION	)	
Petitioner,	)	
	)	
v.	)	<b>DOCKET NO. EC-23, SUB 50</b>
	)	
CHARTER COMMUNICATIONS	)	
PROPERTIES LLC,	)	
	)	
Respondent.	)	

**RESPONSIVE TESTIMONY**

**OF**

**NESTOR MARTIN**

**Submitted on Behalf of**

**Charter Communications Properties, LLC**

**October 30, 2017**

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1                                   **I. INTRODUCTION AND SUMMARY**

2   **Q. Please state your name, business address, and occupation.**

3   A. My name is Nestor M. Martin. My business address is 7910 Crescent Executive  
4       Drive, 5th Floor, Charlotte, North Carolina 28217. I am the Senior Director of  
5       Construction, Carolina Region, for Charter Communications Properties, LLC  
6       ("Charter").

7   **Q. On whose behalf is this testimony being presented?**

8   A. My testimony is offered on behalf of Charter.

9   **Q. What business is Charter engaged in?**

10   A. Charter and its affiliates operate cable systems in North Carolina and in 40 other  
11       states across the country. Charter provides video, broadband, and digital phone  
12       services to commercial and residential customers.

13   **Q. Please describe your professional experience and current role at Charter.**

14   A. I have worked in the cable industry for nearly 40 years. I have been employed by  
15       Charter for about a year-and-a-half, since it merged with Time Warner Cable and  
16       acquired Time Warner Cable Southeast LLC ("TWC") in 2016. Prior to the  
17       merger, I had worked with TWC for about 10 years. I held various positions with  
18       TWC, including Senior Director of Network Engineering, Senior Director of  
19       Construction for the East Region, and Senior Director of Construction for the  
20       Carolinas. After the merger, I have continued to work with TWC in the Carolina  
21       Region in my current role, in addition to acquiring additional responsibilities  
22       related to Charter's operations in its Carolina Region. I have responsibilities for  
23       planning, budgeting and directing of outside plant construction operations for the  
24       combined companies in the Carolina Region.

1 **Q. Have you ever submitted testimony in a North Carolina Utilities Commission**  
2 **Proceeding?**

3 A. Yes. I submitted testimony on behalf of TWC in four proceedings arising under  
4 North Carolina General Statute Section 62-350 that were the subject of hearings  
5 in June of this year.<sup>1</sup> I also have testified in open court in two trials conducted  
6 before the North Carolina Business Court related to pole attachment rates under  
7 Section 62-350.<sup>2</sup>

8 **Q. What is the purpose of your testimony?**

9 A. I am submitting testimony in this proceeding to respond to testimony provided by  
10 Mr. Lee Layton, a representative of Blue Ridge Electric Membership Corporation  
11 (“Blue Ridge”), as well as testimony submitted on behalf of Blue Ridge by  
12 Gregory Booth and Wilfred Arnett, as they pertain to the rates, terms, and  
13 conditions governing attachments to poles owned by the Cooperative.

14 **Q. Please summarize your testimony.**

15 A. My testimony addresses the rates Charter has paid to make attachments to Blue  
16 Ridge’s poles. Going forward, Charter is willing to pay an annual pole  
17 attachment rate that compensates the utility for Charter’s fair share of the utility’s  
18 costs of owning and maintaining poles. Given the minimal amount of surplus  
19 space Charter uses on Blue Ridge’s poles described by Charter’s witness Micheal  
20 Mullins, and the economic principles described by Charter’s expert witness

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<sup>1</sup> See *Time Warner Cable Southeast LLC v. Jones-Onslow Electric Membership Corp.*, Docket No. EC-43, Sub-88; *Time Warner Cable Southeast LLC v. Carteret-Craven Electric Membership Corp.*, Docket No. EC-55, Sub-70; *Time Warner Cable Southeast LLC v. Surry-Yadkin Electric Membership Corp.*, Docket No. EC-49, Sub-55; *Union Electric Membership Corp. v. Time Warner Cable Southeast LLC*, Docket No. EC-39, Sub-44.

<sup>2</sup> See *Time Warner Entertainment – Advance/Newhouse P’ship vs. Town of Landis*, No.10 CVS 1172, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014, and *Rutherford Elec. Membership Corp. v. Time Warner*

1 Patricia Kravtin, Charter believes its fair share is best represented by an allocation  
2 of those costs based on the proportion actually used by Charter of the space on the  
3 pole than can be used to suspend wires and cables above the streets. This  
4 approach is consistent with the pole rates Charter pays to investor-owned utilities  
5 (“IOUs”) and incumbent local exchange companies (“ILECs”), whose poles are  
6 distributed around and throughout the service territory served by Blue Ridge and  
7 are functionally identical to the Cooperative’s poles. I will also propose just and  
8 reasonable terms and conditions to govern Charter’s attachment to Blue Ridge’s  
9 poles, general industry standards, and how these proposals differ from that offered  
10 by Blue Ridge.

11 **II. CHARTER’S ATTACHMENTS TO BLUE RIDGE POLES**

12 **Q. Can you describe Charter’s cable systems in North Carolina?**

13 A. Charter constructs, operates, and maintains hybrid fiber-coaxial cable systems in  
14 North Carolina, including in areas where Blue Ridge provides electric service.  
15 Charter’s communications facilities are installed overhead and underground.

16 **Q. Why does Charter attach to Blue Ridge’s utility poles?**

17 A. Charter attaches its fiber optic and coaxial cable wires to Blue Ridge’s poles in  
18 order to provide its competitive communications services to subscribers within  
19 Blue Ridge’s service area. As Mr. Mullins explains in his testimony, Charter is  
20 reliant on access to Blue Ridge’s poles to provide its services.

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*Entertainment – Advance/Newhouse P’ship*, 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).

1    **Q.     For how many poles has Blue Ridge invoiced Charter each year since 2015?**

2    A.     Charter was invoiced by Blue Ridge, and paid for, attachments on the following  
3           number of poles for each year since 2015:

4           •    In 2015, 26,301 poles.

5           •    In 2016, 26,301 poles.

6           •    In 2017, 27,674 poles.

7    **Q.     What has Blue Ridge charged for Charter's attachments, and what has Charter  
8           paid since 2015?**

9    A.     Blue Ridge has invoiced Charter at \$2.22 per month, or \$26.64 per year, since  
10          2015. Charter has paid the monthly invoices through August 2017.

11                    **III.     CHARTER'S ATTACHMENTS TO UTILITY POLES**  
12                    **THROUGHOUT NORTH CAROLINA**

13   **Q.     Does Charter attach to poles owned by other pole owners in North Carolina?**

14   A.     Yes. Charter has arrangements with dozens of pole owners in North Carolina to  
15          attach to their utility poles, including IOUs, ILECs, municipally owned utilities,  
16          and other electric cooperatives like Blue Ridge.

17   **Q.     Are poles owned by other utilities similar to the poles owned by Blue Ridge, and  
18          are Charter's attachments similar as well?**

19   A.     Yes. IOUs like Duke Energy, telephone companies like AT&T and CenturyLink,  
20          municipal utilities, and cooperatives (both electric and telephone) own poles  
21          throughout North Carolina—including in and around Blue Ridge's service  
22          territory—and those poles are very similar, if not indistinguishable from Blue  
23          Ridge's poles. Because most utility poles are similar, Charter's attachments are  
24          generally the same no matter whose pole is being used.

1     **Q.     Do these similarities give rise to industry standards?**

2     A.     Yes. In my years of experience in the cable business and the construction of cable  
3           systems, I have seen hundreds of pole attachment agreements. Because the  
4           parties all face the same pole-attachment related issues, the pole attachment  
5           agreements are often similar as well. A collection of agreements across many  
6           pole owners in a region, such as North Carolina, can serve as a barometer of what  
7           terms and conditions are just and reasonable to address the utility's safety  
8           concerns in a commercially reasonable manner.  
9           But consideration of these agreements should account for the legal and regulatory  
10          backdrop against which they are negotiated. Agreements with IOUs and ILECs,  
11          for example, have long been subject to regulation, which means the parties to  
12          them are generally on equal footing at the negotiating table. Agreements with  
13          electric cooperatives and municipally owned utilities, however, often have been  
14          negotiated in the absence of any legal or regulatory backstop. As a result, those  
15          agreements can result in outliers, particularly when it comes to the annual pole  
16          attachment rate.

17    **Q.     Why is that?**

18    A.     The existence of pole attachment regulation affects the parties' leverage in the  
19          negotiations. Charter often has not had an alternative to attaching to utility poles  
20          when building its cable system. This means Charter has had to gain access to the  
21          utility's poles to build its network or extend service to new customers in the  
22          utility's service area. Where pole attachment rates, terms, and conditions are not  
23          regulated, the utility enjoys all of the leverage in the negotiation. While some  
24          unregulated utilities hew closely to industry standards, others leverage their

1 superior bargaining position to extract exorbitant rates and excessive terms from  
2 the cable operator. Even where a complaint process exists, some cable operators  
3 will feel compelled to bend to the utilities' excessive demands to meet customer  
4 demand, rather than incur the costs, uncertainties, and delays associated with  
5 litigation.

6 **Q. Do the respective size of the companies matter in these negotiations with**  
7 **unregulated entities?**

8 A. Not really. The issue is that the attaching party generally has no alternative to  
9 attaching on the pole owner's poles. The owner has a monopoly on critical  
10 infrastructure that is needed to deploy service and, therefore, has the ability to  
11 dictate the terms of attachment regardless of the respective size of the entities  
12 negotiating.

13 **Q. Do Charter's agreements in North Carolina reflect industry standards?**

14 A. Generally, yes, with respect to terms and conditions in attachment agreements,  
15 where only a few unregulated utilities have attempted to impose unreasonable  
16 demands. But a number of previously unregulated cooperatives and municipal  
17 utilities have imposed excessive annual pole attachment rates. TWC litigated a  
18 few cases under Section 62-350, and was able to negotiate a resolution after the  
19 North Carolina Business Court entered its orders in the Rutherford and Landis  
20 cases, and those decisions either became final or were affirmed on appeal. We  
21 hope the resolution of this case and the others the Commission is considering will  
22 give clarity to the parties and allow Charter and the other pole owners to avoid  
23 these disputes in the future.



1    **Q.     What does Charter pay for its attachments to poles in North Carolina?**

2    A.     Attached as NM Exhibits 1 and 2 are charts documenting the annual pole  
3           attachment rates paid by Charter and TWC to pole owners across the state in  
4           recent years. The rates in the TWC table marked with an asterisk are being paid  
5           under protest and/or subject to true-up.

6    **Q.     How does each pole owner set its pole attachment rate?**

7    A.     The rates of IOUs and ILECs have been limited to the maximum rate calculated  
8           under the rules of the Federal Communications Commission (“FCC”), so we are  
9           able to ensure that their rates are set according to FCC standards. Cooperatives  
10          and municipal utilities, however, have generally charged a rate dictated  
11          unilaterally by the pole owner. Sometimes, pole agreements with coops and  
12          municipal utilities specify a formula, but even in those cases, the formula has  
13          typically been imposed by the pole owner. While we attempt to negotiate these  
14          rates, the pole owners have often been unwilling to negotiate, and we often have  
15          had no choice but to pay the rate the utility demands.

16   **Q.     What are the average rates paid in North Carolina to IOUs and ILECs under**  
17   **the FCC formula?**

18   A.     The rates charged under the FCC formula change from year to year based upon  
19          the pole owner’s costs. But we can verify whether it complies with the FCC’s  
20          formula largely by using the utility’s publicly reported data. The table below  
21          shows the rates Charter paid to IOUs and ILECs in North Carolina from 2015  
22          through 2017, and the average of those rates for each year.

1

**Table 1: Rates Paid By Charter To IOUs In North Carolina**

<b>Investor-Owned Electric Utility</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
<b>Dominion Power</b>	\$5.30	\$6.64	\$6.94
<b>Duke Energy</b>	\$4.96	\$5.21	\$5.08
<b>Progress Energy*</b>	\$9.75	\$9.75	\$9.75
<b>Average IOU Rates</b>	<b>\$6.64</b>	<b>\$7.20</b>	<b>\$7.26</b>

2

\*Charter's rates to Progress Energy are based on a settlement and are higher than calculated FCC rates.

3

4

**Table 2: Rates Paid By Charter To ILECs in North Carolina**

<b>Incumbent Local Telephone Co.</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
<b>AT&amp;T</b>	\$2.17	\$2.48	\$2.78
<b>CenturyLink*</b>	\$5.00	\$4.25	\$4.00
<b>Frontier</b>	\$3.05	\$2.98	\$2.75
<b>Verizon</b>	\$4.83	\$4.89	\$1.13
<b>Windstream</b>	\$1.89	\$1.59	\$1.96
<b>Average ILEC Rates</b>	<b>\$3.38</b>	<b>\$3.24</b>	<b>\$2.52</b>

5

\*Reflects highest rate charged in North Carolina.

1                                    **IV.     REASONABLE AND INDUSTRY-STANDARD**  
2                                    **TERMS AND CONDITIONS OF ATTACHMENT**

3     **Q.     How does Charter believe the Commission should resolve the parties' disputes**  
4                    **about just and reasonable terms and conditions of attachment?**

5     A.     Charter believes that the best measure of reasonableness is the industry standard  
6                    terms and conditions found across pole attachment agreements in North Carolina,  
7                    between Charter and all types of pole owners (IOU, ILEC, municipal, or cooperative)  
8                    and between Blue Ridge and its joint users and other third-party attachers. In doing  
9                    so, the Commission should take into account the legal and regulatory conditions that  
10                  existed at the time the agreements were negotiated, including the fact that agreements  
11                  with municipal and cooperative utilities pre-dating G.S. § 62-350 were negotiated  
12                  without any legal or regulatory backstop on which Charter could rely.

13    **Q.     How should the Commission weigh the reasonableness of rates, terms, and**  
14                    **conditions in agreements with municipal and cooperative utilities pre-dating**  
15                    **G.S. § 62-350?**

16    A.     On the one hand, these "unregulated" agreements, like the 2003 and 2008 agreements  
17                    between Charter and Blue Ridge, may contain burdensome and unreasonable rates,  
18                    terms, and conditions as a result of the parties' unequal bargaining power. That  
19                    Charter or some entity agreed to these terms and conditions when it believed it had no  
20                    other choice (or adequate recourse) does not mean they are or ever were reasonable,  
21                    especially where they depart radically from the standard terms and conditions found  
22                    in the majority of other pole agreements in the state. On the other hand, these  
23                    agreements may contain rates, terms, and conditions that are squarely in-line with the  
24                    industry standard. This fact strongly supports the reasonableness of these terms. It  
25                    also undermines Blue Ridge's attempts to leverage this dispute to impose non-  
26                    standard and punitive terms and conditions on Charter as punishment for Charter's

1 decision to dispute the pole attachment rate. Blue Ridge's acceptance of industry  
2 standard terms and conditions for the majority of the other communications attachers  
3 on its poles also undercuts its assertions that these terms are somehow no longer  
4 reasonable.

5 **Q. What do you believe the Commission should take from Blue Ridge's agreements**  
6 **with its joint users and other third party attachers ?**

7 A. These agreements are also strong indicators of reasonable terms and conditions for a  
8 new agreement with Charter. Blue Ridge has extended reasonable terms and  
9 conditions of attachment to several third-party attachers other than Charter, including  
10 Charter's competitor Skybest. And all of Blue Ridge's joint use agreements contain  
11 reasonable terms and conditions that are consistent with the industry standard. Blue  
12 Ridge has not indicated any need or current intent to renegotiate these agreements, or  
13 any legitimate reason why these terms would be unreasonable for Charter but  
14 reasonable for these other companies. To the extent Blue Ridge asserts that its joint  
15 users are different because they share poles, information Blue Ridge provided in  
16 response to Charter's discovery requests show that Blue Ridge maintains very few  
17 attachments on its joint users poles, particularly compared to the number of  
18 attachments its joint users make on Blue Ridge poles. Its joint users are thus situated  
19 very similarly to Charter. And Blue Ridge cannot credibly assert that a term that is  
20 reasonable for other communications attachers is not reasonable for Charter.

21 **Q. Can you summarize the reasonable, industry-standard terms and conditions you**  
22 **believe should be included in the parties' new agreement?**

23 A. Yes. For the issues in dispute, I summarize the industry-standard terms and  
24 conditions that emerge from Charter's North Carolina agreements and Blue Ridge's  
25 agreements with other attachers to its poles. My summary includes the TWC

1 agreements I analyzed in the June proceedings, and adds to the analysis the Charter  
2 agreements in North Carolina that we collected in response to Blue Ridge's discovery  
3 requests. Extensive detail about these industry-standards can be found in NM Exhibit  
4 3, attached to my testimony. I also note where I do not believe Charter and Blue  
5 Ridge have a dispute. Finally, while Blue Ridge has not proposed specific language  
6 for the Commission to approve as reasonable, I have proposed language that is  
7 consistent with the industry-standard terms I summarize.

8 **A. DIRECT CHARGES FOR POLE ATTACHMENTS**

9 **Q. Blue Ridge has asked the Commission to clarify that it may charge separately**  
10 **for costs related to processing Charter's attachments, performing necessary**  
11 **make-ready and transfer work for Charter, auditing and inspecting Charter's**  
12 **attachments, and to perform "other activities" directly related to Charter's**  
13 **attachments. Does Charter dispute this?**

14 A. As a general matter, no. Charter is willing to pay for the reasonable, verifiable,  
15 actual costs incurred by Blue Ridge for work directly (and solely) related to  
16 Charter's attachments. Charter's agreements with Blue Ridge have always  
17 contained provisions that require Charter to pay the Cooperative application fees  
18 and make-ready charges. And Charter is willing to pay for work associated with  
19 auditing and inspecting its attachments. These provisions are more directly  
20 implicated by other terms and are discussed elsewhere in my testimony. Charter  
21 also proposes a pole attachment rate methodology that is designed to recover from  
22 Charter its appropriate share of the Cooperative's costs of owning and  
23 maintaining poles, including a portion of Blue Ridge's maintenance, operations,  
24 and administrative expenses. Charter's rate methodology will ensure the recovery  
25 of any unspecified costs Blue Ridge believes it incurs as a result of Charter's  
26 attachments.

1

2 **Q. Is Blue Ridge's proposal just and reasonable?**

3 A. No. Mr. Arnett proposes an ambiguous provision for the recovery of "but-for"  
4 costs on pages 46-47 of his pre-filed testimony. But he does not propose any  
5 language for the Commission to adopt. As I mentioned above and explain in  
6 detail below, Charter will agree to pay for the verifiable direct costs Blue Ridge  
7 incurs for processing our attachment applications, make-ready work necessary to  
8 accommodate our attachments, audits, and inspections of our attachments to its  
9 poles. Including a vague provision related to these costs—which the agreement  
10 already will address—will only create confusion.

11 Additionally, it is not clear to me what the "but-for" costs actually are  
12 beyond these costs, and those that are otherwise recovered through the  
13 administrative and maintenance charges built into the annual attachment fee that  
14 Ms. Kravtin proposes. Neither Blue Ridge nor its experts have actually quantified  
15 these or any other so-called "but-for" costs. That the "but-for" costs cannot be  
16 quantified illustrates the ambiguity and breadth of Blue Ridge's proposal. It  
17 seems to be subject to whatever interpretation (and dollar amounts) Blue Ridge  
18 wants to pass through to Charter. Blue Ridge's vague proposal would give it  
19 carte blanche to increase the burden on Charter—including through double  
20 charging for costs it already recovers—until Blue Ridge achieves its stated  
21 preference of kicking us off the poles. Blue Ridge's proposal will lead only to  
22 more disputes before the Commission because it undermines our statutory right to  
23 be on the poles and the deployment of our facilities in North Carolina.

1   **Q.    How does Charter propose the Commission should address the application**  
2       **process, application fees and make-ready expenses?**

3    A.    Blue Ridge seems to believe that Charter disputes that it should be required to  
4           submit applications for all new attachments and that it disputes its obligation to  
5           pay an application fee. That is not the case. In the parties' negotiations, Charter  
6           agreed to submit a permit application for every new attachment; it simply  
7           proposed a modified fee structure that would apply only to applications involving  
8           more than ten poles, recognizing that the Cooperative likely incurs minor costs  
9           processing applications involving only a handful of poles. But Charter does not  
10          maintain for purposes of this proceeding that it is unreasonable for it to submit an  
11          application fee on each new permit application.

12                 Charter is willing to follow procedures for new permit applications that  
13                 are similar to those outlined in the parties' 2008 agreement (except with respect to  
14                 Professional Engineer certifications, discussed below). Charter in fact proposes a  
15                 reasonable, non-refundable application fee for each new permit application.  
16                 Additionally, Charter remains willing to pay for the preparation of engineering  
17                 plans for any necessary make-ready construction work as well as direct costs of  
18                 any make-ready construction work necessary in Blue Ridge's discretion, to  
19                 accommodate Charter's attachments. Charter's proposed provisions thus ensure  
20                 that Blue Ridge completely recovers any direct costs it incurs related to Charter's  
21                 attachments.

22   **Q.    What language does Charter propose the Commission adopt in this**  
23       **proceeding?**

24    A.    Charter proposes the Commission approve the following language in this  
25          proceeding to ensure costs are recovered:

1        **Annual Attachment Fee:** Charter shall pay Cooperative an Annual  
2        Attachment Fee in advance, on a per pole basis for each foot of usable space  
3        occupied by Charter, not to include risers, in an amount [negotiated by the  
4        parties or specified by the Commission, provided such Fee shall not exceed  
5        the just and reasonable rate determined consistent with the Order of the  
6        Commission in this proceeding] for each of the Cooperative's poles to which  
7        Charter is attached.

8        **Direct Charges.** Charter shall be responsible for the direct, verifiable costs  
9        the Cooperative incurs to accommodate Charter's attachments to its poles for  
10       pre and post-construction inspections, makeready engineering and makeready  
11       construction, and audits of Charter's attachments. Charter will submit a non-  
12       refundable Application Fee of \$10 per pole along with its permit application  
13       for new attachments to cover administrative costs of processing the  
14       application. Upon receipt of the application and fee, the Cooperative will  
15       provide Charter of an estimate of any make ready work necessary to  
16       accommodate the proposed attachments. The estimate will include the cost of  
17       the make-ready survey in addition to the costs of the make-ready work  
18       including any change or addition to a pole, pole replacement, or  
19       rearrangement of existing facilities on a pole necessary to accommodate  
20       Charter's proposed facilities, together with the Make Ready Fee. The Make  
21       Ready Fee shall not include costs to correct existing violations of the safety  
22       standards caused by the Cooperative or other attachers. Only upon Charter's  
23       approval of the estimated cost, shall the make-ready work begin. Charter will  
24       pay the total estimated cost of the Make Ready Fee. After completion of the  
25       work, Charter will be assessed the Cooperative's actual costs. If the actual  
26       cost is less than the estimated cost, the excess shall be returned to the  
27       Licensee. If the actual cost exceeds the estimated cost, the additional amount  
28       shall be billed to Charter.

29       **Q.     How does Charter's proposal compare to what is standard in the industry?**

30       A.     Charter's proposal is consistent with virtually every pole attachment agreement it has  
31       executed in North Carolina.

32       **Q.     Why is Charter's proposal reasonable?**

33       A.     Charter's proposal is consistent with standard requirements in the industry and  
34       across the state of North Carolina. Charter's proposal conforms to the parties'  
35       prior agreements, even though in practice the parties have followed a different  
36       approach that has also worked well on the ground. I also note that none of Blue



1 Ridge's other pole attachment agreements includes any language along the lines  
2 proposed by Mr. Arnett.

3 **B. CERTIFICATIONS RELATED TO NEW ATTACHMENTS**

4 **Q. Is a requirement that Charter certify that its new attachments on the**  
5 **Cooperative's poles were made in compliance with applicable requirements**  
6 **reasonable?**

7 A. As a general matter, yes. But Charter should be allowed to submit a certification  
8 from an "authorized representative" after Charter has made its last attachment  
9 covered by a specific permit. Charter's certification would state that its  
10 attachments are of sound engineering design and fully comply with the applicable  
11 engineering standards under the pole attachment agreement and the latest version  
12 of the safety and operational requirements in effect at the time of the attachment.  
13 The certification also would state that Charter constructed its attachments  
14 substantially as provided in the engineering plans reviewed by Blue Ridge as part  
15 of the make-ready process.

16 **Q. How would Charter define "authorized representative"?**

17 A. An "authorized representative" is an employee or contractor of Charter having  
18 adequate knowledge of and experience with the National Electrical Safety Code  
19 ("NESC") and any other safety and operational requirements of the parties'  
20 Agreement.

21 **Q. Why is Charter's proposal reasonable?**

22 A. Charter's proposal is more generous than the current industry standard. Of  
23 Charter and its affiliate TWC's 90 agreements with pole owners in North  
24 Carolina, 68 do not require any kind of post-installation certification. *See* NM Ex.  
25 3, Table 1. Of the rest, five require a certification only upon demand of the pole

1 owner. To my knowledge, we have never been asked to provide a certification.  
2 While nine of the ninety agreements require a Professional Engineer certification,  
3 all of these agreements were between Charter/TWC and either an electrical  
4 cooperative or a municipal utility, and all predated G.S. § 62-350. All of the  
5 agreements Charter has executed with municipal utilities and cooperatives since  
6 the enactment of G.S. § 62-350 allow certification by an authorized representative  
7 or a construction supervisor.

8 **Q. Blue Ridge asserts that Charter's certification should be submitted by a**  
9 **Professional Engineer? Is this reasonable?**

10 A. No. Requiring a Registered Professional Engineer to certify each and every  
11 communications attachment is wholly unnecessary and would be prohibitively  
12 expensive. For communications attachments, having a Professional Engineer's  
13 certification is not industry standard. As detailed in Mr. Mullin's testimony, Blue  
14 Ridge does not require a Professional Engineer to certify the attachments of any  
15 of their other third-party attachers, except for Morris Broadband, and Blue Ridge  
16 does not ever recall seeing a certification from that company. Our employees and  
17 contractors have decades of experience, are trained to safely attach Charter  
18 facilities to poles in accordance with the requirements of the NESC, and generally  
19 speaking we have a great track record of success. I would note, in addition, that  
20 Blue Ridge can always conduct a post-construction inspection and involve a PE as  
21 it deems necessary, at Charter's expense. Charter follows similar arrangements  
22 with other pole owners in the state.

23 **Q. Do you have any language regarding certifications that the Commission**  
24 **could adopt in the course of this proceeding?**

25 A. Yes. I propose the Commission adopt the following language:

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

### 10                                   C.       OVERLASHING

11   **Q.       What is the process of overlashing?**

12   A.       Overlashing is the process of “lashing” additional fiber optic or coaxial cable onto  
13 the steel strand supporting a pre-existing mainline communications wire  
14 attachment. Overlashed fiber optic and coaxial wires are lightweight and about a  
15 half-inch in diameter. In some cases, Charter will use the overlashing activity to  
16 swap out a lower-capacity wire already lashed to the strand with a new higher-  
17 capacity wire.

18   **Q.       Why does Charter overlash its attachments?**

19   A.       Overlashing is vital for cable operators like Charter because it enables them  
20 quickly, efficiently, and cost-effectively to deploy advanced communications  
21 services and additional network capacity relying on existing and previously-  
22 permitted mainline attachments. The ability to quickly upgrade facilities is  
23 critical for Charter to compete for and serve new customers, particularly business  
24 customers seeking higher-capacity connections.

25   **Q.       What does Charter believe is a reasonable contract term related to overlashing**  
26 **attachments?**

27   A.       A reasonable provision would allow Charter to overlash its facilities without  
28 applying for a separate permit where the overlash will not cause Charter’s

1 attachment to become non-compliant with applicable standards. Charter will  
2 notify Blue Ridge of the overlash by submitting a notification prior to making the  
3 overlash. This practice has been acceptable to other cooperatives in the past,  
4 including Jones-Onslow Electric Membership Corporation and Union Electric  
5 Membership Corporation. In our experience, an email notification has garnered a  
6 quick response and work has proceeded to everyone's satisfaction. Charter will  
7 provide Blue Ridge with information regarding its overlashing that the  
8 Cooperative requires in good faith to allow it to do any non-discriminatory  
9 loading analysis that it deems necessary. Charter will pay Blue Ridge's actual  
10 costs of any loading analysis it actually performs, including work Blue Ridge  
11 deems necessary from one of its professional engineers. We also understand Blue  
12 Ridge's staking technicians have a design manual that is intended to "take the  
13 math" out of the loading analysis. *See* NM Ex. 2; NM Ex. 4, at 182-188. The  
14 design manual includes pages indicating the loading attributable to hypothetical  
15 cable and telephone attachments. *See* NM Ex. 5 at BREMC-013727. We are  
16 willing to work with Blue Ridge to provide actual information about Charter's  
17 overlashed facilities for use in the design manual and to streamline the process for  
18 everyone. If Blue Ridge determines that the overlash caused the attachment to be  
19 non-compliant, then the parties will follow the procedures outlined elsewhere in  
20 the agreement for bringing the attachment up to code. As has been the parties'  
21 past practice, Charter's overlashed facilities will not be subject to an additional  
22 annual attachment fee.

1   **Q.    How does Charter’s position compare to terms and conditions Blue Ridge has**  
2   **agreed to with other communications attachers?**

3    A.    As Mr. Mullins explains, Charter’s proposal to give notice of its overlashed  
4           attachments is more than Blue Ridge requires of any of its joint users, and more  
5           than it requires of other third-party attachers, including Charter’s competitor  
6           Skybest. None of these companies are required to permit or even provide notice  
7           of overloading activity. This is the case even though all communications  
8           companies employ the practice of overloading, and telephone companies’ copper  
9           bundles are larger and heavier than the coaxial or fiber optic wires used by  
10          Charter. Further, Charter’s language allows Blue Ridge to conduct any loading  
11          analysis it deems necessary in connection with the overload. To the extent the  
12          Commission believes this is a reasonable requirement in a pole agreement,  
13          Charter suggests that this standard should apply to all attachers.

14   **Q.    How does Charter’s position compare to industry standards?**

15    A.    Charter’s position is standard in the industry. After an extensive rulemaking  
16          involving all interested stakeholders, including pole-owning electric utilities, the  
17          FCC adopted an express policy promoting overloading because it does not  
18          materially affect the safety of an attachment and it “facilitates and expedites  
19          installing infrastructure essential to providing cable and telecommunications  
20          services to American communities.” *Implementation of Section 703(e) of the*  
21          *Telecommunications Act of 1996, Amendments of the Commission’s Rules and*  
22          *Policies Governing Pole Attachments*, Report & Order, 13 FCC Rcd 6777, 6807  
23          ¶ 62 (1998) (“Telecom Order”). Consistent with this, the FCC rejected attempts  
24          to impose permitting requirements for overloading as “unjust and unreasonable on

1 [their] face.” See *Cable Television Assoc. of Ga. v. Ga. Power Co.*, Order, 18  
2 FCC Rcd 22287 ¶ 13 (2003).

3 **Q. How does Charter’s proposal compare to other pole attachment agreements in**  
4 **North Carolina?**

5 A. It is entirely consistent with those agreements. The majority of Charter’s pole  
6 agreements in North Carolina, 65 of 90, do not require any kind of permitting or  
7 even notice for overlashed facilities. NM Ex. 3, Table 2 (beginning on page 12).  
8 Where overloading is subject to some kind of procedure, most of those  
9 agreements (19 of 25) require notice only, and do not subject Charter’s projects to  
10 a permitting process. *Id.* Six of those agreements allow after-the-fact notice.  
11 Another six of the agreements require five days’ prior notice, and two more allow  
12 for 48 hours’ notice for smaller overlash projects. *Id.* A handful require slightly  
13 more advance notice, typically for larger overloading projects, like the agreement  
14 TWC signed last summer with Energy United Electric Membership Corporation,  
15 which requires 15 days prior notice for overloading projects involving more than 5  
16 poles. *Id.*

17 **Q. Is there a legitimate concern about overloading on prior notice without a full**  
18 **permitting process?**

19 A. No. As I noted, full permitting for overloading is not common, and the loading  
20 impact of overloading is very minor. The communications companies who account  
21 for about two-thirds of the third-party attachments on Blue Ridge’s poles—including  
22 Charter’s direct competitors—are not required to submit any kind of notice or  
23 application to Blue Ridge for their overloading. And Charter’s lightweight fiber optic  
24 and coaxial cable wires and associated equipment generally do not have any material  
25 impact on pole loading. Charter’s wires are far lighter and have a smaller radius that

1 could be subject to wind pressure than the older copper wires historically used by  
2 telephone companies like AT&T, CenturyLink, and Skyline. And they are far lighter  
3 than the larger and heavier equipment installed by Blue Ridge at the top of the pole,  
4 where the loads from wind and ice are greater. Because Blue Ridge does not require  
5 Charter's direct competitors to permit overlashing, and overlashing is an important  
6 technique for winning commercial customers, it is essential that Charter not be  
7 subject to a harsher regime. Otherwise, Charter could not compete for the sort of  
8 small businesses that often require overlashing of only a few poles.

9 **Q. Is a requirement for a full permitting process prior to overlashing a reasonable**  
10 **requirement?**

11 A. No. Unnecessary permitting requirements for overlashing would contribute to  
12 delaying and potentially interfering with Charter's ability to bring broadband and  
13 other services to more people in North Carolina, and to compete with other  
14 providers.

15 **Q. Mr. Booth suggested that the NESC requires permitting prior to overlashing,**  
16 **is that correct?**

17 A. No. I am not aware of any permitting requirement for overlashing in the NESC.

18 **Q. What contract language does Charter propose the Commission adopt in this**  
19 **proceeding?**

20 A. The Commission should adopt the following provision, which addresses the  
21 permitting process for attachments to the Cooperative's poles:

22 **Permit and Approval Process:** Charter shall comply with the Cooperative's  
23 generally applicable, non-discriminatory Attachment approval application  
24 procedures for all new Attachments to the Cooperative's poles, except for  
25 secondary poles (a/k/a lift poles or drop poles). Charter shall notify Cooperative  
26 of all new secondary pole Attachments on a quarterly basis, and such Attachments  
27 shall be subject to the Annual Attachment Fee. Charter may overlash its existing  
28 Attachments where such activity will not cause the Attachment to become  
29 noncompliant with the safety standards described above. Charter shall provide

1 prior notice to Cooperative of all new overlashings at least 15 days in advance,  
2 except for projects involving the overlashings of 5 or fewer poles, when Charter  
3 shall provide at least forty-eight (48) hours prior notice to Cooperative. Licensor  
4 may perform a post-overlash inspection of Licensee's overlashing on poles as  
5 Licensor deems critical in its reasonable discretion, including reliance on  
6 Licensor's professional engineers as Licensor deems necessary, and Licensee  
7 shall pay for the actual cost. Licensee shall provide sufficient information  
8 regarding its overlash to allow Licensor to determine the impact of Charter's  
9 overlash on the pole loading. There shall be no additional annual Attachment Fee  
10 for overlashings of Licensee's existing facilities.

11 **Q. Does Charter's proposed post-overlash notice requirement address Blue Ridge's**  
12 **concerns about overloading its poles?**

13 A. Yes. Under Charter's proposed language, Charter would provide notification  
14 before overlashing any of its existing attachments. Based on its knowledge of the  
15 age and facilities already existing on its poles, Blue Ridge could then determine  
16 whether a load bearing study needs to be performed. Given it is rare for an  
17 overlashed wire to contribute substantially to the loading of a pole, let alone  
18 overload it, this approach is sensible and will minimize the costs and delays  
19 associated with making overlashed attachments. This is also consistent with the  
20 requirements applicable to other communications companies making attachments  
21 to Blue Ridge's poles, industry standards, and the bulk of agreements Charter has  
22 entered into with other pole owners in North Carolina.

23 **D. UNAUTHORIZED ATTACHMENTS**

24 **Q. Is Charter willing to pay an unauthorized attachment penalty?**

25 A. In certain circumstances, yes. But the penalty must be reasonable and Charter  
26 should be provided sufficient information to determine whether the attachment is  
27 truly unauthorized and given an opportunity to obtain a permit for it. Permitting  
28 practices and record-keeping by pole owners and Charter have not been consistent  
29 over the years. A reasonable penalty is an attachment fee equal to the otherwise



1 applicable annual pole attachment fee for the number of years since the most  
2 recent inventory, or five years, whichever is less.

3 **Q. Does Charter have language it proposes the Commission adopt to address**  
4 **unauthorized attachments?**

5 A. Yes. Charter asks the Commission to approve the following language:

6 **Unauthorized Attachments:** The Cooperative may assess a fee for any  
7 Attachment that has not been authorized in accordance with this Agreement  
8 (“Unauthorized Attachment”). The fee for Unauthorized Attachments shall be  
9 equal to five (5) times the current Annual Attachment Fee and shall be  
10 imposed in a non-discriminatory manner as to all attachers.

11 **Q. Is Charter’s proposal consistent with the industry standard?**

12 A. Yes. None of our agreements allow pole owners to seek penalties reaching back  
13 decades. *See* NM Ex. 3, Table 3 (beginning at page 24). This is consistent with  
14 the FCC’s conclusion that allowing open-ended penalties that reach back  
15 indefinitely would “grossly overcompensate” the pole owner if the unauthorized  
16 attachment were installed more recently. *See Cable Television Assoc. of Ga.*, 18  
17 FCC Rcd 22287 ¶ 22 (rejecting penalty that would require payment of pole  
18 attachment fees until the last inventory, and instructing utility to negotiate a  
19 reasonable maximum period for the assessment of back-rent). Only about half of  
20 Charter’s agreements authorize any kind of financial penalty. Of those, almost  
21 half tie the penalty to the then-current annual rental rate, and many cap the  
22 penalty at five years of rental payments. *See* NM Ex. 3, Table 3. If anything,  
23 Charter’s position is more generous than the industry standard. It is also  
24 straightforward and easy to apply, because it does not require the parties to  
25 determine when the attachment was made, only whether it was authorized.

1 **Q. Is Charter's proposal consistent with the requirements Blue Ridge imposes**  
2 **on other communications attachers?**

3 A. It is more generous than what Blue Ridge imposes on other communications  
4 attachers. As detailed by Mr. Mullins, most of Blue Ridge's third-party  
5 communications attachers are not required to pay any kind of penalty for the  
6 discovery of unauthorized attachments, even though Blue Ridge conceded it  
7 discovered unauthorized attachments by all parties during its 2015/2016 audit.  
8 Even where Blue Ridge's agreements contain penalty provisions, it has not  
9 enforced them. *See* NM Ex. 4, at 171, 223.

10 **E. NON-COMPLIANT ATTACHMENTS**

11 **Q. Should the agreement address remediating non-compliant attachments**  
12 **discovered during a safety inspection or otherwise?**

13 A. Yes. Charter has a strong interest in maintaining a safe and reliable network. But  
14 attachments can become non-compliant over time for a number of reasons,  
15 including from stresses exerted by the environment, acts of God, actions by  
16 members of the public, and issues created by the pole owner or third-party  
17 attachers. Charter should have a reasonable opportunity to participate in the  
18 process of allocating responsibility for non-compliant attachments. And it should  
19 be allowed to remedy non-compliant attachments without paying unreasonable  
20 penalties. Charter proposes industry standard terms for safety inspections and  
21 remediation be included as part of any new agreement.

22 **Q. Does Charter have a recommendation for contract language dealing with**  
23 **non-compliant attachments?**

24 A. Yes. Charter proposes the Commission approve the following language for a new  
25 agreement:

**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 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.

15 **Q. How does this differ from the provision Blue Ridge proposes?**

16 A. Mr. Layton's testimony suggests that he believes that the responsibility for taking  
17 corrective action for non-compliance should always default to Charter, unless  
18 Charter can prove it did not cause the violation. But this ignores the many factors  
19 I discussed above that could lead to a compliance issue. Nor should Charter be  
20 responsible for correcting the cost of non-compliance resulting from "build  
21 downs" or actions by the Cooperative or other attachers after Charter's facilities  
22 were attached. Sometimes it is clear that Blue Ridge created the violation, as  
23 discussed in Mr. Mullin's testimony. But other times Charter cannot "prove" in  
24 those circumstances that the Cooperative or a third-party created the issue,  
25 because the necessary records are not in its possession. A provision that  
26 automatically assigns responsibility to Charter would invite a substantial risk of  
27 abuse and disputes.

28 **Q. Should Blue Ridge be entitled to charge a penalty for non-compliant**  
29 **attachments?**

30 A. No. There should be no penalty for non-compliant attachments because causation  
31 is not always provable and all attachers, including the Cooperative, cause

1 violations. Charter has as much interest in maintaining a safe and reliable  
2 network as Blue Ridge. Charter must provide reliable service for competitive  
3 reasons and to maintain its critical 911 capabilities. And it must provide a safe  
4 network for its employees and the public. Additionally, while I am not a lawyer, I  
5 understand that N.C.G.S. 62-350(d)(3) requires Charter to pay only the  
6 Cooperative's "reasonable and actual costs" to bring the facilities into compliance  
7 (if Charter did not do so itself after reasonable notice). Should Charter fail to  
8 bring its facilities into compliance, then the Cooperative may revoke the permit  
9 for the attachment which would require Charter to file a new application for the  
10 attachment after curing any violation.

11 **Q. Mr. Booth suggests all of Charter's attachments should comply with the latest**  
12 **version of the NESC and other codes and standards. Is this reasonable?**

13 A. No. Bringing every existing facility up to new safety standards each time a new  
14 standard is adopted is unnecessary and extraordinarily expensive. It is not a practice  
15 followed by Blue Ridge and is not required of its other communications attachers.  
16 Nor does the NESC require that all existing attachments and electric facilities be  
17 brought up to the latest version of the safety code, except as specifically indicated in  
18 the code. Rather, facilities are deemed compliant as long as the facilities meet the  
19 requirements that were in place at the time they were made. Charter thus believes  
20 that a reasonable provision would require Charter to place and maintain its  
21 attachments according to the requirements of the latest NESC in effect as of the date  
22 of the attachment. Charter would be required to conform its attachments to the  
23 requirements of subsequent revisions of the safety code, to the extent required by the  
24 NESC. Charter also would be required to comply with generally applicable

1 requirements, specifications, rules and regulations of any governing authority with  
2 jurisdiction, the terms of the parties' pole attachment agreement, including the agreed  
3 upon rules Blue Ridge sets forth in exhibits to the agreement.

4 **Q. Do you have proposed language to address this issue?**

5 A. Yes. I propose the following language:

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

20 **Q. Why are Charter's proposals reasonable?**

21 A. Charter's proposals fit squarely with the industry standard. And, as Mr. Mullins  
22 testified, Blue Ridge requires virtually the same of its joint users and other  
23 communications attachers. Charter's proposal also mirrors the statutory  
24 requirements of G.S. § 62-350. The statute requires notice and cure provisions,  
25 and also requires all parties to "work cooperatively to determine the causation of,  
26 and to effectuate any remedy for, noncompliant lines, equipment, and  
27 attachments. G.S. § 62-350(d)(4).

1 F. RECOVERY OF SPACE

2 **Q. Does Charter dispute a contract provision that would allow Blue Ridge to**  
3 **recover space on its pole occupied by Charter's attachment, at Charter's**  
4 **expense, for its core electric service?**

5 A. No. Charter appreciates that Blue Ridge will occasionally require additional  
6 space for the provision of its core utility service. Charter would agree to  
7 reasonable language similar to the language in the 2008 agreement that allows  
8 Blue Ridge to recover space for its core utility service. In no event, however,  
9 should Charter be required to pay for the recovery of space to be used for Blue  
10 Ridge's competitive communications service, Ridgeline. Otherwise, it could  
11 favor itself in the provision of competitive communications services. *See*  
12 N.C.G.S. 62-350(a).

13 **Q. Do you have a response to Mr. Booth's discussion of the supply space and his**  
14 **attempt to blame all encroachments on Charter?**

15 A. Whatever Mr. Booth happens to believe, the agreements between Blue Ridge and  
16 Charter (and between Blue Ridge and other communications attachers) say  
17 nothing about an 8.5 foot "supply space." The actual agreements instead specify  
18 a required separation between Blue Ridge's facilities and the communications  
19 facilities. Given these requirements, it is incumbent upon Blue Ridge to tell us  
20 that it needs more space, and ask us to rearrange our attachments, vacate the pole,  
21 or pay for a taller pole to accommodate the change, rather than dropping a  
22 transformer too close to our cable and creating a dangerous condition.

1    **Q.     What language does Charter propose the Commission approve in this**  
2    **proceeding?**

3    A.     Charter recommends the Commission approve the following language:

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

13                                   **G.     RESERVATION OF SPACE**

14    **Q.     Does Charter dispute a contract provision that would allow Blue Ridge to**  
15    **reserve space on its pole for expansion of its core electric service?**

16    A.     No. But the requirement needs to be reasonable and non-discriminatory.

17    **Q.     What is wrong with Blue Ridge's proposal to reserve at least 72 inches**  
18    **vertical clearance under Blue Ridge's grounded neutral?**

19    A.     Having such a requirement is unreasonable, inefficient and wasteful. The 72 inch  
20            requirement, if strictly enforced, would lead to Charter replacing poles  
21            unnecessarily with taller poles, even where there is no expectation that the extra  
22            height will be used. For instance, if Charter needed to attach to a line of poles  
23            running down a rural highway with very few existing attachments, there may be  
24            plenty of space to provide adequate clearance for Charter to meet the NESC  
25            clearance requirements and maintain 40 inches of safety space below the electric  
26            facilities. But a taller pole would be necessary to ensure 72 inches of separation.  
27            Requiring Charter to replace those poles would serve no productive purpose. The  
28            taller poles would just line the road, half empty, obstructing views.

1    **Q.     But Charter already follows this requirement, right?**

2    A.     We do, but Blue Ridge's staking technicians have worked with us to avoid  
3           unnecessary waste. As for a new agreement, we have learned through discovery  
4           in this case that virtually every other communications attacher (other than  
5           Charter) is allowed to place its facilities within 40 inches of Blue Ridge's neutral.  
6           Blue Ridge's 72 inch requirement is thus not only discriminatory, it is pointless,  
7           because the vast majority of third-party attachments made to its poles  
8           (approximately 70 percent) are not subject to it.

9    **Q.     What does Charter propose for this provision?**

10   A.     Charter proposes the following language regarding new or relocated attachments:

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

16   **Q.     Is Charter's position consistent with the industry standard?**

17   A.     Yes. The industry standard, as embodied in virtually all of Charter's other North  
18           Carolina agreements, provides that utilities may reserve space for their core utility  
19           purposes, pursuant to a bona-fide development plan. *Implementation of the Local*  
20           *Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd.  
21           15499, 16053, at ¶1169 (1996) ("We will permit the electric utility to reserve  
22           space if such reservation is consistent with a bona fide development plan. . . . The  
23           electric utility must permit use of its reserved space by cable operators . . . until  
24           such time as the utility has an actual need for that space. . . . The utility shall give  
25           the displaced cable operator . . . the opportunity to pay for the cost of any  
26           modifications needed to expand capacity and to continue to maintain its



1 attachment.”). The language proposed above is similar to the provisions that  
2 govern every other attachment to the Cooperative’s poles by other  
3 communications companies, and would ensure non-discriminatory treatment of  
4 the communications companies attached to Blue Ridge’s poles.

5 **Q. How does this proposal relate to your proposed language that Charter not be**  
6 **liable for the costs of correcting build-downs?**

7 A. The language of these two provisions would allow Blue Ridge to trigger their  
8 rights to reclaim pole space where they need the space on a going forward basis.  
9 But where Blue Ridge has simply built down on Charter’s facilities without  
10 giving notice or an opportunity for Charter to avoid having Blue Ridge create a  
11 safety violation related to its attachment, Blue Ridge should not be permitted to  
12 push the remediation costs on Charter. That would only reward Blue Ridge for  
13 having created an unsafe situation that could affect the workers of both  
14 companies.

#### 15 **H. TRANSFER & RELOCATION OF FACILITIES**

16 **Q. When do attachers need to transfer facilities?**

17 A. In addition to instances where the pole owner needs to recover space, Charter may  
18 need to transfer its facilities when a pole is being replaced or relocated. This  
19 could happen for any number of reasons, including because the pole is old, worn,  
20 rotten, or broken, or because a taller or stronger pole is needed to accommodate  
21 other facilities or meet engineering standards. In some instances, poles will need  
22 to be relocated because of proposed widening of a roadway, or because of the  
23 needs of adjacent property owners.

1     **Q.     How do pole attachers and pole owners usually coordinate those transfers?**

2     A.     With Blue Ridge, we use an automated system, NJUNS, which helps pole owners  
3             with multiple attachers coordinate notice and timing of facility transfers. This  
4             coordination is necessary because Charter often cannot make a transfer until the  
5             phone company first moves its facilities.

6     **Q.     What happens if Charter does not transfer its facilities in the prescribed**  
7             **time?**

8     A.     We try not to let that happen, but I understand it has happened in Blue Ridge's  
9             territory. Charter accepts responsibility for the actual costs incurred by Blue  
10            Ridge if it must make a special return to the job site to remove an old pole  
11            because we failed to meet the time period for completing the transfer.

12    **Q.     How does Charter propose the new agreement address transfer of facilities?**

13    A.     The new agreement should include reasonable language that requires Blue Ridge  
14             to provide us notice in writing (or electronically) to transfer our facilities within  
15             60 days, consistent with the 2008 agreement. Blue Ridge would be allowed to  
16             transfer our facilities at our expense if we failed to do so within the required time.  
17             Alternatively, the Cooperative may terminate the permit associated with that  
18             attachment upon thirty days' notice, if we fail to complete the transfer. Charter  
19             proposes the Commission approve the following language:

20             **Transfers & Relocation:** The Cooperative may replace or relocate poles for a  
21             number of reasons, including without limitation when existing poles have  
22             deteriorated, when new attachers require additional pole space, and when  
23             poles must be relocated at the request of the North Carolina Department of  
24             Transportation, another governmental body or a private landowner. In such  
25             cases, Charter shall, within 60 days after receipt of written notice, transfer its  
26             Attachments to the new poles. If such transfer is not timely performed, the  
27             Cooperative may, at its option: (i) revoke the permit for the Attachment and  
28             declare it to be an Unauthorized Attachment subject to the Unauthorized  
29             Attachment fee; or (ii) transfer Charter's Attachments and Charter shall

1 reimburse the Cooperative for the actual costs of completing such work. If  
2 Cooperative elects to do such work, it shall not be liable to Charter for any  
3 loss or damage except when caused by the Cooperative's gross negligence or  
4 willful misconduct.

5 **Q. Is Charter's proposal consistent with the industry standard?**

6 A. Yes. Except in emergency situations, 60 of Charter's 90 pole attachment  
7 agreements in North Carolina require notice to Charter of the need to transfer  
8 attachments during or at a prescribed period of time. Nineteen allow the pole  
9 owner to transfer the attachments itself if Charter has failed to do so in the  
10 prescribed time. *See* NM Ex. 1, Table 4 (beginning at page 58). This proposal is  
11 also consistent with the parties' current agreement.

12 **I. INDEMNIFICATION**

13 **Q. How does Charter propose to cover indemnification?**

14 A. Charter believes that a reasonable indemnification provision would require each  
15 party to indemnify the other for its own negligence. The following language  
16 protects both parties interests:

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

25 **Q. Is a mutual indemnification provision just and reasonable?**

26 A. Yes. Mutual indemnification is standard in the industry. Blue Ridge also have  
27 mutual indemnification provisions with virtually all of its joint-users. I believe  
28 mutual indemnification is necessary based on the noncompliance issues involving  
29 Charter's facilities created by Blue Ridge, as detailed in Mr. Mullins' testimony.

## J. DEFAULT REMEDIES

**Q. What terms will govern if a party defaults on its obligations under the agreement?**

A. Reasonable “default remedies” ensure the Cooperative has avenues to remedy circumstances where Charter has defaulted on its obligations under the Agreement. Charter’s proposal is consistent with the 2008 agreement, and would require Blue Ridge to provide written notice to Charter describing, in reasonable detail, the alleged default and give Charter a reasonable time to correct the violation (depending on the nature or character of the alleged violation). If Charter failed to perform work it is obligated to do, despite notice of default, Blue Ridge could elect to take a number of different actions. The language of the proposal is as follows:

**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.

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

1 shall be entitled to take all steps necessary to cure any defaults. The 30-day  
2 notice and cure period does not apply to any default by Charter of its payment  
3 obligations under this Agreement.

4 **Q. How does this proposal differ from what Blue Ridge proposes?**

5 A. It is unclear what, precisely, Blue Ridge proposes. This proposal provides notice  
6 and an opportunity for Charter to cure a default and clarifies the obligations and  
7 limitations of each party's responsibilities.

8 **Q. How do these proposals compare to the industry standard?**

9 A. The default remedies I outline above would give the pole owner more options for  
10 remedies than the default provisions found in many other pole attachment  
11 agreements. *See* NM Ex. 3, Table 5 (beginning at page 101).

12 **K. DISPUTED INVOICES**

13 **Q. Is it reasonable for Blue Ridge to require Charter to pay disputed invoices in full**  
14 **pending resolution of the dispute?**

15 A. No. Blue Ridge asserts that allowing Charter to dispute an invoice without paying  
16 it would give Charter incentives to work "less than efficiently" to resolve  
17 disputes. The converse is of course true as well—if Charter is required to pay  
18 upfront, then Blue Ridge would be incented to work less than efficiently to  
19 resolve disputes. If a good faith dispute exists, I believe both parties will work  
20 together to resolve it. In any event, this issue seems to be addressed already by  
21 Section 62-350, which requires a party seeking to bring a dispute to the  
22 Commission pay only "any undisputed fees related to the use of poles, ducts, or  
23 conduits which are due and owing." G.S. § 62-350(c).



1 V. CONCLUSION  
2 Q. Does this conclude your responsive testimony?  
3 A. Yes.