

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. EC-23, SUB 50

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

**BLUE RIDGE ELECTRIC
MEMBERSHIP CORPORATION,**

Petitioner,

v.

**CHARTER COMMUNICATIONS
PROPERTIES LLC,**

Respondent.

**PETITIONER BLUE RIDGE
ELECTRIC MEMBERSHIP
CORPORATION'S
PROPOSED ORDER**

HEARD: Wednesday, November 8, 2017, at 9:30 a.m. in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

Thursday, November 9, 2017, at 9:30 a.m. in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

December 18, 2017, at 1:30 p.m. in Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Chairman Edward S. Finley, Jr., Presiding; and Commissioners Bryan E. Beatty, Jerry C. Dockham, James G. Patterson, ToNola Brown-Bland, and Daniel G. Clodfelter

APPEARANCES: For Blue Ridge Electric Membership Corporation:

Debbie W. Harden

Matthew F. Tilley
Womble Bond Dickinson (US) LLP
One Wells Fargo Center; Suite 3500
301 South College Street
Charlotte, NC 28202

For Charter Communications Properties, LLC

Marcus W. Trathen
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Suite 1700, Wells Fargo Center
Raleigh, North Carolina 27601

Gardner F. Gillespie
J. Aaron George
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue NW; Suite 100
Washington, DC 20006

TABLE OF CONTENTS

	<u>Page</u>
I. PROCEDURAL HISTORY AND BACKGROUND.....	4
II. FINDINGS OF FACT.....	5
A. Rate Methodology.....	11
B. Alternative, Additional Rate Findings	25
i. Alternative 1 – Application of Actual Blue Ridge Data to the FCC Cable Rate	25
ii. Alternative 2 – Modification of the FCC Cable Rate’s Space Allocation Formula with Respect to the Communications Worker Safety Zone.....	29
C. Costs and Concerns Justifying Contract Terms and Conditions.....	32
i. Charter Workmanship and Safety Violations	33
ii. Additional Costs and Expenses of Charter Attachments	38
III. CONCLUSIONS AND DISCUSSION	40
A. Rate Methodology.....	41
B. Alternative, Additional Conclusions Regarding Rate Methodology	46
i. Alternative 1 – Application of Actual Blue Ridge Data to the FCC Cable Rate	46
ii. Alternative 2 -- Modification of the FCC Cable Rate’s Space Allocation Formula with Respect to the Communications Worker Safety Zone.....	48
C. Terms and Conditions	50
i. Applications for New Attachments.....	52
ii. Attachments to “Drop Poles” (a/k/a “Secondary Poles”)	53
iii. Overlashing	54
iv. Disputed Invoices.....	55
v. Engineering Certification.....	56
vi. Maintenance and Transfers	57
vii. Non-Compliant Attachments	58
viii. Insurance	60
ix. Default Remedies.....	60
x. Indemnity	61
xi. Reservation of Space.....	62
xii. Recovery of Space	63
D. Charter’s Counterclaim for “True Up” Payments.....	65

BY THE COMMISSION: This is a proceeding pursuant to N.C.G.S. § 62-350 (“Section 62-350”) to adjudicate a dispute between Petitioner Blue Ridge Electric Membership Corporation (“Blue Ridge”) and Respondent Charter Communications Properties, LLC (“Charter”) regarding the rates, terms, and conditions for Charter’s attachments to Blue Ridge’s utility poles.

I. PROCEDURAL HISTORY AND BACKGROUND

On November 11, 2016, Blue Ridge commenced this action by filing its Verified Complaint and Petition for Relief against Charter, pursuant to G.S. 62-350 and Commission Rule R1-9, seeking to resolve a dispute over just and reasonable rates and terms for attachments of Charter’s facilities to Blue Ridge’s distribution poles. Specifically, Blue Ridge requested that this Commission set rates for Charter’s attachments to Blue Ridge’s poles and to confirm certain terms and conditions for inclusion in a pole attachment agreement between the parties.

On February 1, 2017, Charter filed its Answer and Counterclaims to Blue Ridge’s Corrected Complaint.

On March 1, 2017, Blue Ridge filed its Verified Response to Charter’s Counterclaims.

On June 7, 2017, the Commission entered an Order Establishing Procedural Schedule (as amended, the “Scheduling Order”) establishing case management deadlines and setting this matter for hearing. Upon joint motions of the parties, the Commission entered orders modifying the procedural schedule in these cases on October 10, 2017.

On September 27, 2017, the Commission granted Blue Ridge's motion to amend its petition to request that the Commission approve certain additional terms and conditions for inclusion in the parties' pole attachment agreement. Charter filed an answer to the amended petition on October 16, 2017.

This matter was called for hearing on November 8, 2017 and an evidentiary hearing was held on November 8, 2017, and November 9, 2017. The hearing was adjourned on November 9, 2017, and reconvened for a final day of proceedings on December 18, 2017.

Following the hearing in this matter, the Commission ordered the parties to submit post-hearing briefs addressing their various contentions and the issues in dispute.

Having carefully considered the pleadings, evidence and testimony submitted in this matter, stipulations of the parties, as well as the arguments of counsel, the Commission now makes the following findings of fact and conclusions.

II. FINDINGS OF FACT

Based on the pleadings, the evidence and testimony admitted during the hearing of this matter, and the stipulations of the parties, the Commission makes the following findings of fact:

1. Blue Ridge is a non-profit, member-owned electric cooperative established under the North Carolina Electric Membership Corporation Act, N.C.G.S. § 117-6, *et seq.*, that serves electric customers—who are, by virtue of statute, the

cooperative's members—in Allegheny, Ashe, Caldwell, and Watauga counties, as well as portions of Avery, Alexander, and Wilkes Counties

Evidence Supporting Finding of Fact No. 1—The evidence supporting this finding of fact is found in direct testimony of Lee Layton, Blue Ridge's Senior Vice President and former Chief Operating Officer, Transcript Vol. 1, pp. 29-31, and the Joint Stipulations of the parties filed on November 02, 2017.

2. Charter is a communications service provider that operates cable systems providing voice, video, internet, and broadband services to customers in North Carolina, including customers in the more densely populated areas of Blue Ridge service territory.

3. Charter's cable system includes both overhead (aerial) and underground facilities. Charter generally does not own or install utility poles to support its aerial facilities, but instead attaches its aerial facilities to poles owned by electric or other utilities, such as Blue Ridge.

Evidence Supporting Finding of Fact Nos. 2-3—The evidence supporting these findings of fact is found in the testimony of Nestor Martin, Charter's Senior Director of Construction, Hearing Transcript Vol. 3, pp. 75-77.

4. Blue Ridge and Charter have entered into a series a pole attachment agreements since Charter first began attaching its facilities to Blue Ridge's poles, pursuant to which Charter has agreed to pay Blue Ridge pole attachment fees on an annual or monthly basis.

5. On or about January 1, 2003, Charter and Blue Ridge entered into a Pole Attachment License Agreement (the "2003 Agreement"). The agreement provided that

Charter would pay Blue Ridge annual attachment fee of \$19.00 during 2003 (the first year of the agreement), which would increase on a yearly basis to \$23.00 in 2008, the fifth year of the agreement.

6. On or about September 1, 2008, Charter and Blue Ridge entered into a Pole Attachment License Agreement (the “2008 Agreement”). The agreement provided that Charter would pay Blue Ridge a monthly pole attachment fee of \$1.92, resulting in an annual pole attachment fee of \$23.04 in the first year of the agreement. The agreement further provided that, starting in Year 2 of the agreement, the pole attachment fee would increase annual in an amount equal to the percentage change in the Consumer Price Index for all Urban Consumers, South Urban Non-Metropolitan areas.

7. The terms of the 2003 and 2008 Agreements are substantially the same, except for the rates, and both agreements use the same form.

Evidence Supporting Findings of Fact Nos. 4-7—The evidence supporting these findings of fact is found in the Joint Stipulations, filed by the parties in this action on November 02, 2017. The 2008 Agreement is attached as Exhibit LL-3 to the direct testimony of Lee Layton, Transcript Vol. 1, pp. 34-35; the 2003 Agreement is attached as Exhibit LL-4 to the direct testimony of Lee Layton, Transcript Vol., 1, pp. 34-35.

8. The 2003 and 2008 Agreements were the result of negotiations between Charter and Blue Ridge. Charter did not request any changes to the terms and conditions of these agreements in the course of its negotiations, but instead focused its negotiations solely on the rate.

Evidence Supporting Findings of Fact No. 8—The

evidence supporting this finding of fact is found in the direct testimony of Mr. Layton, Transcript Vol. 1 pp. 35-37, as well as the admissions of Charter's Construction Supervisor for the Western North Carolina Market, Michael Mullins, Transcript Vol. 3, p. 289 ("Q. And sitting here today do you have any information of a single proposed term that Charter asked Blue Ridge to change? A. No, I do not.")

9. Although the 2008 Agreement originally provided that it would expire after five years (an initial three year term with two, automatic, one-year extensions), Charter and Blue Ridge continue to operate under the terms of the 2008 Agreement. The parties stipulated that "Charter attaches and has attached facilities to Blue Ridge's utility poles pursuant to [the 2008 Agreement]." *See* Joint Stipulations, ¶ 6. Likewise, it is undisputed that Charter has continued to pay pole attachment fees to Blue Ridge pursuant to the 2008 Agreement, without protest. Charter's witnesses have also uniformly testified that Charter and Blue Ridge continues to operate under the 2008 Agreement, notwithstanding the expiration of its original term, and that the terms of the 2008 Agreement remain in place. Accordingly, the Charter and Blue Ridge are subject to an existing pole attachment agreement.

Evidence Supporting Finding of Fact No. 9—This finding is supported by the Joint Stipulations of the parties, *see* Joint Stipulations, ¶ 6, and the testimony of Mr. Mullins. *See* Transcript, Vol. 3, p. 223 ("Charter makes its attachments under a pole attachment entered into in 2008 and attached as [MM Exhibit 1]."); p. 225 (referring to "Charter's **current agreement**, entered into in 2008" (emphasis added)); p. 227 ("Charter makes its attachments to these 'mainline' and 'secondary' poles pursuant to the parties' 2008 agreement"); p. 231 (acknowledging that the 2008 agreement requires Charter to attach its facilities at least 72 inches below Blue Ridge's lowest grounded neutral); p. 232

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

10. During 2015-17, Blue Ridge charged, and Charter paid, pole attachment fees for Charter’s attachments to Blue Ridge’s poles, as follows:

- In 2015, Blue Ridge invoiced Charter, and Charter paid Blue Ridge, \$2.22 per month (\$26.64 per year) for 26,301 attachments.
- In 2016, Blue Ridge invoiced Charter, and Charter paid Blue Ridge, \$2.22 per month (\$26.64 per year) for 26,301 attachments.
- From January 2017 and continuing through present, Blue Ridge invoiced Charter, and Charter paid Blue Ridge, \$2.22 per month for 27,674 attachments.

Evidence for Finding of Fact No. 10 – Support for this finding of fact is found in the Joint Stipulation of the parties, *see* Joint Stipulations, ¶¶ 8-12, and the testimony of Mr. Layton, Vol. 1, p. 48.

11. In 2015, in accordance with the 2008 Agreement, Blue Ridge commenced a pole attachment audit which was completed in 2016 (the “2015-16 Pole Audit”). The 2015-16 Pole Audit found that Charter had 27,674 attachments to 24,888 Blue Ridge poles, meaning that Charter had 1,373 unauthorized attachments.

Evidence Supporting Finding of Fact No. 11—This finding of fact is supported by the Joint Stipulations of the parties, *see* Joint Stipulations, ¶ 12, and the testimony of Mr. Layton. *See* Transcript, Vol. 1, p. 15.

12. Blue Ridge initiated negotiations with Charter for a new pole attachment agreement on May 22, 2014, when Blue Ridge's representative, Brad Shields, sent an e-mail to Michael Mullins letting him know he would be providing an updated agreement for Charter to review. Mr. Shields followed up on July 8, 2014, with another e-mail that included a proposed agreement with substantially the same terms as the 2008 Agreement, except for the rate and a provision allowing for automatic renewals. Despite several follow up requests from Blue Ridge, Charter did not respond to this proposal until May 26, 2015, when Ronnie McWhorter sent a response on behalf of Charter objecting to certain of the terms Charter had previously agreed to as part of the 2003 and 2008 Agreements.

13. Following Charter's May 2015 response, Blue Ridge attempted to negotiate a new agreement and provided a draft addressing some of Charter's requests on December 7, 2015. Once again, despite Blue Ridge's repeated follow up requests, Charter did not respond until September 29, 2016, when it sent a draft that still disputed many of the terms it had previously accepted as part of its prior agreements. In addition, Charter indicated that it would not agree to Blue Ridge's rate proposal and instead marked the rate provisions in the proposed draft "TBD."

Evidence Supporting Findings of Fact Nos. 12-13—Evidence supporting these findings of fact is found in the direct testimony of Mr. Layton, Transcript, Vol. 1, pp. 35-39, and correspondence founding in Exhibits LL-5, LL-6, LL-7, LL-8, and LL-9.

A. Rate Methodology

14. The costs of Blue Ridge's distribution poles may be found by reference to Account 364, designated, "Poles, Towers, and Fixtures," which Blue Ridge must keep in accordance with a uniform chart of accounts set by the Rural Utility Service ("RUS"). This account is reflected on Blue Ridge's RUS year-end financial reports RUS Form-7.

Evidence Supporting Findings of Fact 14—Testimony supporting this finding is found in the direct testimony of Blue Ridge's rate expert, Wilfred Arnett, Transcript Vol. 2, pp. 61-62, and the testimony of Charter's rate expert, Patricia Kravtin, Transcript, Vol. 4, pp. 176-77.

15. Blue Ridge argues the Commission should adopt the rate methodology approved by the Tennessee Valley Authority ("TVA") to govern pole attachment rates charged by electric cooperatives and local power companies that distribute TVA power. See TVA Board Resolution dated February 2016, and attached as Exhibit WA-4 to the Testimony of Wilfred Arnett. This methodology is referred to as the "TVA Rate." Charter argues the Commission should adopt the so-called "FCC Cable Rate" methodology used by the Federal Communications Commission to set the pole attachment rates investor-owned utilities ("IOUs") charge cable companies pursuant to Section 224(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 224(d).

16. Both the TVA Rate and the FCC Cable Rate seek to derive a maximum, annual, per-pole, attachment rate by allocating the costs of a bare pole and the associated carrying charges in proportion to the space on the pole each attaching entity

supposedly uses. Thus, both rate methodologies use the following formula to determine a just and reasonable pole attachment rate:

$$\text{Pole Attachment Rate} = (\text{Space Allocation}) \times (\text{Net Cost of a Bare Pole}) \times (\text{Carrying Charge Rate})$$

“Space Allocation” is the percentage of the total pole costs allocated to each attacher based on the amount of space it uses (or is presumed to use) on the pole. “Net Cost of a Bare Pole” is the pole owner’s total net investment in its pole plant, after applying a discount factor, divided by the total number of poles. The “Carrying Charge Rate” represents the total, per-pole operating and overhead expenses associated with the electric utility’s pole plant, including (i) allocated administrative overhead, (ii) maintenance, (iii) depreciation, (iv) tax or tax equivalent charges, and (v) an allowed rate of return. The Carrying Charge Rate is expressed as a percentage of the Net Cost of a Bare Pole.

17. The TVA Rate and the FCC Cable Rate generally calculate the “Net Cost of a Bare Pole” and “Carrying Costs” in the same manner, except that the TVA methodology (a) specifies that maintenance charges shall be calculated using three-year average and (b) sets an electric utility’s allowed annual rate of return of 8.5%, rather than the 11% or 11.25% allowed under the FCC Cable Rate.

Evidence Supporting Findings of Fact Nos. 15-17 – The evidence supporting these findings of fact is found in the direct testimony of Mr. Arnett, Transcript, Vol 2, pp. 46-58, in which he described in detail the reasons supporting the TVA Rate methodology and its decision adopting that methodology, set forth in Exhibit WA-4, including a comparison of the TVA Rate methodology to the FCC Cable Rate and the reasons the TVA determined the FCC Cable rate is inadequate to

compensate cooperatives for use of their poles.

18. Both the TVA Rate and the FCC Cable Rate employ rebuttable presumptions regarding the height and use of a utility's poles, as follows: (i) the average height of a distribution pole is 37.5 feet; (ii) these poles are, on average, buried six feet deep, and (iii) in order to maintain proper clearances, the lowest attachment on a pole must be at least 18 feet off the ground.

19. While the TVA Rate and the FCC Cable Rate differ dramatically in how they allocate space on the pole among electric companies and communications attachers in setting the Space Allocation Factor, they both assume a pole that is 37.5 feet tall, divided as follows:

- “Support Space” (24 feet) – The lower portion of the pole that is either buried or necessary to provide sufficient clearance above the ground for attachers' facilities.
- “Usable Space” (13.5 feet) – The upper portion of the pole to which electric utilities and communication service providers may attach their lines. Assuming there are three attachers—an electrical utility, a cable provider, and a telephone provider—this “Usable Space” can be subdivided as follows:
 - Electrical “Supply Space” (7.17 feet) – The space in which the electric utility may attach its lines, transformers, and other facilities.
 - “Safety Space” (3.33 feet) – A forty-inch clearance zone which between any communications and electrical facilities, comprising the

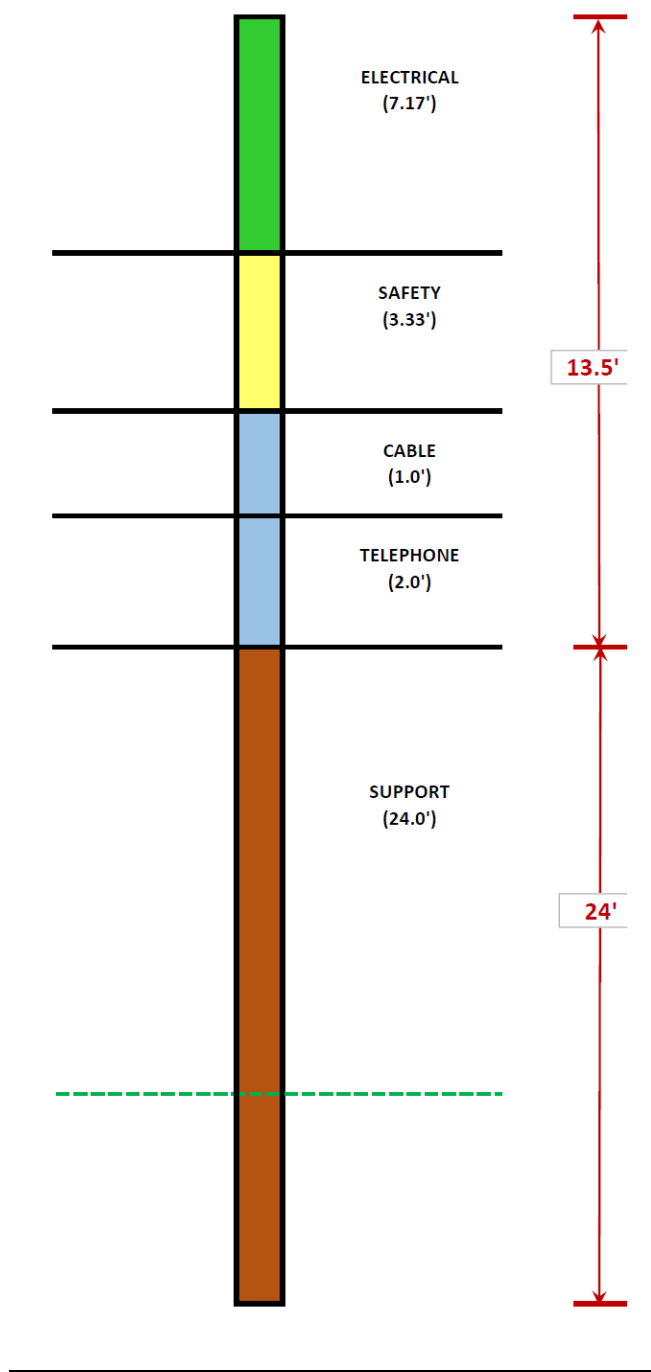
“Communications Worker Safety Zone” required by the National Electric Safety Code (“NESC”) to protect communications workers from contact with a utility’s electrical facilities.

- Cable (one foot) – One foot allocated to the cable provider’s attachment.
- Telephone (two feet) – Two feet allocated to the telephone provider’s attachment.

A diagram showing this division of the pole is as follows:

Figure 1

(Division of Space on Pole Under TVA and FCC Formulas—Using Presumptions)



20. The principal difference between the TVA Rate and the FCC Cable Rate is how the “Space Allocation” factor is determined. The TVA Rate methodology allocates an equal share of the 24 feet of Support Space to each attaching entity, including the power company and all communications attachers, because all attaching entities need, and benefit equally from, that space. Further the TVA Rate methodology allocates the 3.33 feet (40 inches) of “Safety Space” (also known as the “Communications Worker Safety Zone”) equally among communications attachers, but not the power company, because that space exists only to protect communications workers and would not be required if there were no communications companies attached to the pole. The FCC Cable Rate, however, presumes that a cable company only uses one foot of the 13.5 feet (or 7.41%) of the usable space on the pole (including the Communications Worker Safety Zone), and then allocates the costs associated with the entire pole (the Support Space and the Usable Space) to the cable company using that same ratio.

Evidence Supporting Finding of Fact Nos. 18-20—Evidence supporting these findings of fact is found in the testimony of Mr. Arnett, Transcript, Vol. 2, pp. 54-59, in which he describes the TVA Rate’s allocation of costs associated with space on the pole, as well as the testimony of Gregory Booth, P.E., Transcript, Vol. 3, pp. 67-69, in which he describes the manner in which electric cooperatives and attachers use portions of space on the pole. The evidence supporting Figure 1 is found in the resolution of TVA’s Board of Directors approving use of the TVA Rate formula for use by local power companies that distribute TVA power, Exhibit WA-4, and specifically in the diagrams found in the appendices to that resolution on p. 8 thereof. Further, evidence explaining why the FCC Cable Rate is inadequate to fully compensate Blue Ridge for the use of

its poles, and instead creates a subsidy in favor of communications attachers, such as Charter, is found in the Mr. Arnett's rebuttal testimony found at Transcript Vol. 2, pp. 95-99.

21. Each party that attaches to Blue Ridge's poles—including Blue Ridge, Charter, and any other attacher—uses the "Support Space" on an equal basis. Each entity that attaches to a pole needs the pole to be buried six feet below ground for stability and needs its facilities to be at least 18 feet above ground in order to meet minimum clearances required by the NESC, Department of Transportation ("DOT") regulations, and other applicable standards. Further, all attachers use the Support Space to install "risers," which are transitions between aerial and underground facilities, to provide climbing space for workmen to reach aerial facilities, and to install hardware, such as power supplies, terminals, crossboxes/interfaces, meters, telephone load coils, and capacitors.

22. Because all attaching entities make equal use of the support space, it is appropriate to allocate the costs associated with this space among all attaching entities on an equal basis.

Evidence Supporting Findings of Fact Nos. 21-22—Evidence supporting these findings of fact is found in the direct testimony of Mr. Arnett, Transcript, Vol. 2, pp. 55-57, in which he testifies that each attaching entity derives equal benefit from the common support space on the pole, and therefore it is appropriate to allocate this space among all attaching entities.

23. Blue Ridge is only required to set aside the 3.33 feet (40 inches) attributable to the "Communications Worker Safety Zone" because communications service providers have attached to its poles. The NESC requires this set-off space

between communications attachments and electric supply facilities in order to protect communications workers, who are not trained, qualified, or equipped to work with and around high voltage conductors, from coming into contact with energized electrical facilities. Electric utility workmen are necessarily trained and equipped to work with hazardous voltages, and thus do not benefit from the set-off space provided by the Communications Worker Safety Zone. Indeed, Charter's rate expert, Ms. Kravtin, admitted at hearing that "there's no need for the safety clearances" required by the Communications Worker Safety Zone until a communications company attaches to the pole. *See* Transcript, Vol. 5, p. 34.

24. Charter contends Blue Ridge benefits from the Communications Worker Safety Zone because the NESC allows electric utilities to install street lights less than 40 inches from communications facilities and Blue Ridge has, at times, installed street lights in this space. *However, Blue Ridge introduced uncontroverted evidence that it does not install streetlights in the Communications Worker Safety Zone* Moreover, Blue Ridge would not have to provide the 40-inch Communications Worker Safety Zone if it did not have communications attachers on its poles. While the NESC allows streetlights to be installed in this space, it also allows streetlights to be installed in the electrical Supply Space. Thus, Blue Ridge could install shorter poles if it had no communications attachers, and it has to install taller poles *solely* to accommodate communications attachers, such as Charter.

25. Because the Communications Worker Safety Zone exists *solely* for the benefit of communications attachers, and not the electric utility, it is appropriate to allocate the costs associated with this space only among the communications attachers.

Evidence Supporting Findings of Fact Nos. 23-25—Evidence supporting this finding of fact is found in the testimony of Mr. Arnett, Transcript Vol. 2 pp. 54-57, in which he explains that the Communications Worker Safety Zone exists solely for the benefit of communications attachers, such as Charter, and that Blue Ridge would not have to set aside the Communications Worker Safety Zone if there were no communications attachers on the pole. In addition, Mr. Arnett responded to Charter's contentions regarding the placement of streetlights in the Safety Space, explaining (1) there is no evidence that Blue Ridge places streetlights in this space on anything other than an incidental basis, and (2) since the NESC allows electric utilities to place streetlights anywhere on the pole, including in the Supply Space, the Safety Space is not needed for that purpose, and thus Blue Ridge derives no benefit from this space, which it has to provide solely because a communications attacher, such as Charter, has attached to its pole. Finally, Ms. Kravtin admitted that the Communications Worker Safety Zone is not required until a communications company attaches to the pole during cross examination at hearing. *See* Transcript Vol. 5, p. 34.

26. Both the TVA Rate and FCC Cable Rate methodologies presume there is an average of three attachers on an electric utility's poles for the purpose of establishing the space allocation factor (*i.e.*, the electric utility, a cable company, and a telephone company). While the FCC Cable Rate would use this presumption regardless of the actual number of attachers, the TVA Rate treats this figure as rebuttable. Given that Blue Ridge has records showing the actual number of attachers

on its pole, it is appropriate to use the actual number of average attachers in setting a pole attachment rate.

27. According to Blue Ridge's records and recently collected audit data, Blue Ridge has an average of 2.35 attachers on its poles (*i.e.*, Blue Ridge, Charter, and other third-party attachers), and it is appropriate to use this number in setting the space allocation factor.

Evidence Supporting Finding of Fact No. 27—Evidence supporting this finding of fact is found in the testimony of Mr. Arnett, Hearing Transcript Vol. 2, pp. 66-67; Exhibit WA-5.

28. In addition to the number of attachers, Blue Ridge has actual data rebutting a number of the other presumptions in the TVA and FCC formulas. This evidence, which is reflected in Blue Ridge's RUS and accounting records, is uncontroverted. The Commission therefore finds that the presumptions of the TVA Rate should be replaced with actual figures as follows:

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

See Arnett Test., Transcript, Vol 2, p. 61-62; Exhibit WA-6.

- *Attachment Height*. The FCC cable formula presumes that all entities attaching to the pole require 18 feet of ground clearance, and thus the

first attacher will attach at this height, rendering the remainder of the pole “usable space.” However, because Blue Ridge’s poles are spaced farther apart than is typical, attachers are required to make the first attachment higher on the pole in order to maintain ground clearance. As a result, the first available attachment on Blue Ridge’s poles based on is yearly average pole height was (a) 21.3 feet in 2014, (b) 21.8 feet in 2015, and (c) 21.26 feet 2016. This necessarily results in less “Usable Space” and more “Support Space” that must be allocated among the attachers.

See Arnett Test., Transcript, Vol 2 pp. 63-65; Exhibits WA-12, WA-13.1, WA-13.2, WA-13.3, and WA-13.4.

- *Appurtenance Factor.* This factor represents the percentage of assets other than poles that is included in a utility’s “pole account” (*i.e.*, Account 364 under the REA Uniform System of Accounts) in order to properly derive the annual net cost of a “bare pole” on a utility’s system. While the FCC Cable rate presumes an appurtenance rate of 85% (meaning 15% of a utility’s Account 364 is not attributable to distribution poles), While the FCC Cable rate presumes an appurtenance rate of 15%, meaning 85% of a utility’s Account 364 is attributable to distribution poles, Blue Ridge’s true bare pole costs, net of appurtenances, were (a) 87.0% for 2014; (b) 87.29% for 2015; and (c) 87.41% for 2016.

See Arnett Test., Transcript, Vol. 2, p. 61-62; Exhibit WA-7.

- *Number of Attachments / Occupied Space.* The FCC Cable Rate presumes that cable company attachments use only one foot of space, and that a cable company only attaches once to each pole. Blue Ridge's 2015-16 pole audit (the results of which, Charter does not dispute), showed that Charter had 27,674 attachments on 24,888 poles. This means Charter has an average of 1.11 attachments per pole, which is reflected by showing that it uses 1.11 feet of space as opposed to the FCC Cable rate presumption.¹

See Arnett Test., Transcript Vol. 2, p. 63.

Evidence Supporting Finding of Fact No. 28—Evidence supporting these findings of fact are found in the direct testimony of Mr. Arnett, Transcript, Vol. 2, pp. 61-65, as further specified in the specific citations to Mr. Arnett's testimony and exhibits as set forth above.

29. Based on the average number of attachers on Blue Ridge's system and actual data regarding Blue Ridge's poles and attachers, the proper space allocation factor for determining the annual pole attachment for Charter's attachment to Blue Ridge's poles, based on 2016 data, is 41.16%, calculated using the following data:

¹ Both the TVA and FCC Cable rate generate a per-pole rate, versus a per-attachment, rate. Thus, developing a rate for those poles on which Charter has two attachments, rather than just one, requires either (i) establishing a separate rate for those poles on which Charter has two attachments or (ii) adjusting the space attributed to Charter's attachment to reflect that it has an average of 1.1 attachments per pole. As Mr. Arnett explained, these two approaches are mathematically identical. Transcript, Vol. 2, pp. 125-26.

Avg. Number of Attachers	2.35
Space Occupied by Attacher	1.11 feet
Safety Space	3.33 feet
Total Support Space	27.26 feet
Average Pole Height	36.87 feet

30. Based on 2016 data, as reflected on Blue Ridge's RUS "Form 7," the net cost of a bare pole on Blue Ridge's system is \$ 258.30.

31. Based on 2016 data, as reflected on Blue Ridge's RUS "Form 7," the appropriate annual Carrying Charge Rate for Blue Ridge's poles, is 24.98% of the cost of a bare pole. This represents Administrative Charges (3.24%); average annual Maintenance Charges for Blue Ridge's poles over the past three years (6.91%); Depreciation (5.76%); Taxes (0.57%); and an allowed annual Rate of Return (8.5%).

Evidence Supporting Findings of Fact Nos. 29-31—Evidence supporting these findings of fact are found in in Mr. Arnett's testimony, Transcript, Vol. 2, pp. 74-76, in which he describes his application of the TVA Rate formula to Blue Ridge, as well as Exhibit-WA 2.3, in which he provides a worksheet showing his calculation of the TVA Rate formula.

32. The 8.5% Rate of Return specified by the TVA Rate methodology is just, reasonable, and appropriate for use in calculating a pole attachment rate in this case. This rate of return accounts for Blue Ridge's cost of debt as well as its patronage capital, meaning the capital paid by Blue Ridge's members through their electricity bills, over and above the cooperative's operating costs, which is used to finance the Blue Ridge's capital facilities and service its long-term debt, with a portion to be

returned to Blue Ridge's members in the form of capital credits. Moreover, it is substantially less than the 11% or 11.25% rate of return allowed by under the FCC Cable Rate advanced by Charter and relied upon by Charter's expert, Ms. Patricia Kravtin.

Evidence Supporting Finding of Fact 32—Evidence Supporting this finding of fact is found in the testimony of Mr. Arnett, Transcript, Vol. 2, pp. 83-84, where he explains the reasons supporting the TVA Rate formula's use of an 8.5% rate of return and why it is appropriate to use this rate of return instead of the 11% or 11.25% rate of return allowed by the FCC. Mr. Arnett also explains that, while Charter's rate expert Ms. Kravtin testified the FCC Cable Rate allows an 11.25% rate of return, the rate is actually 11% as a result of the FCC's decision to phase-in a lower rate of return over time.

33. Based on the figures set forth above, applying the TVA Rate methodology produces a maximum annual pole attachment rate of \$25.46 for Charter's attachments to Blue Ridge's poles during 2016, calculated as follows:

Net Cost of a Bare Pole	\$ 258.30
x Carrying Charge Rate	24.98%
Annual Cost of Ownership (Per Pole)	<hr/> \$ 64.52
x Space Allocation Factor	41.16%
Pole Attachment Rate	<hr/> \$ 25.56

This amount represents a just and reasonable pole attachment rate for Charter's attachments to Blue Ridge's poles.

Evidence Supporting Finding of Fact No. 33—Evidence Supporting this finding of fact is found in Mr. Arnett’s testimony, Hearing Transcript Vol. 2, pp. 213-215, as well as the worksheet setting forth his calculation of the appropriate rate for attachment to Blue Ridge’s poles under the TVA Rate formula, found in WA Exhibit No. 7

B. Alternative, Additional Rate Findings

[In the event the Commission adopts the FCC Cable Rate, Blue Ridge requests the following Findings of Fact regarding (1) use of actual data, rather than presumptions, and (2) modification of the FCC Cable Rate’s space allocation formula with respect to the Communications Worker Safety Zone.]

i. Alternative 1 – Application of Actual Blue Ridge Data to FCC Cable Rate

33. Both the TVA Rate and the FCC Cable Rate employ rebuttable presumptions regarding the height and use of a utility’s poles, which include presumptions that: (i) the average height of a distribution pole is 37.5 feet; (ii) these poles are, on average, buried six feet deep, and (iii) in order to maintain proper clearances, the lowest attachment on a pole must be at least 18 feet off the ground. In applying the FCC Cable Rate, the FCC treats these presumptions as rebuttable. *See* 47 C.F.R. § 1.1418 (providing that the presumptions regarding space occupied by cable company’s attachment, the amount of usable space, and average pole height “may be rebutted by either party”).

34. The parties disagree as to whether the Commission should use the FCC Cable Rate’s presumptions in determining the appropriate rate for Charter’s

attachments to Blue Ridge's poles, or whether it should employ actual data Blue Ridge has introduced to rebut those presumptions.

35. Blue Ridge has provided actual data to rebut the FCC Cable Rate's presumptions. According to Blue Ridge's records and recently collected audit data, Blue Ridge had an average of 2.35 attachers on its poles (*i.e.*, Blue Ridge, Charter, and other third-party attachers) in the years 2014, 2015, and 2016, and it is appropriate to use this number in setting the space allocation factor for Blue Ridge.

Evidence Supporting Finding of Fact No. 35—Evidence supporting this finding of fact is found in the testimony of Mr. Arnett, Hearing Transcript Vol. 2, pp. 66-67; Exhibit WA-5.

36. In addition to the average number of attachers, Blue Ridge has actual data rebutting a number of the other presumptions in the FCC formulas. This evidence, which is reflected in Blue Ridge's RUS and accounting records, is uncontroverted. The Commission therefore finds that the presumptions of the FCC Cable Rate should be replaced with actual figures as follows:

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

See Arnett Test., Transcript, Vol 2, p. 61-62; Exhibit WA-6.

- b) *Attachment Height.* The FCC cable formula presumes that all entities attaching to the pole require 18 feet of ground clearance, and thus the first attacher will attach at this height, rendering the remainder of the pole “usable space.” However, because Blue Ridge’s poles are spaced farther apart than is typical, attachers are required to make the first attachment higher on the pole in order to maintain ground clearance. As a result the first available attachment on Blue Ridge’s poles based on is yearly average pole height was (a) 21.3 feet in 2014, (b) 21.8 feet in 2015, and (c) 21.26 feet 2016. This necessarily results in less “Usable Space” and more “Support Space” that must be allocated among the attachers.

See Arnett Test., Transcript, Vol 2 pp. 63-65; Exhibits WA-12, WA-13.1, WA-13.2, WA-13.3, and WA-13.4.

- c) *Appurtenance Factor.* This factor represents the percentage of assets other than poles that is included in a utility’s “pole account” (*i.e.*, Account 364 under the REA Uniform System of Accounts) in order to properly derive the annual net cost of a “bare pole” on a utility’s system. While the FCC Cable rate presumes an appurtenance rate of 15%, meaning 85% of a utility's Account 364 is attributable to distribution poles, Blue

Ridge's true bare pole costs, net of appurtenances, were (a) 87.0% for 2014; (b) 87.29% for 2015; and (c) 87.41% for 2016.

See Arnett Test., Transcript, Vol. 2, p. 61-62; Exhibit WA-7.

- d) *Number of Attachments / Occupied Space.* The FCC Cable Rate presumes that cable company attachments use only one foot of space, and that a cable company only attaches once to each pole. Blue Ridge's 2015-16 pole audit (the results of which, Charter does not dispute), showed that Charter had 27,674 attachments on 24,888 poles. This means Charter has an average of 1.11 attachments per pole, which is reflected by showing that it uses 1.11 feet of space as opposed to the FCC Cable rate presumption.

See Arnett Test., Transcript Vol. 2, p. 63.

*Evidence Supporting Finding of Fact No. 5—*Evidence supporting these findings of fact are found in the direct testimony of Mr. Arnett, Transcript, Vol. 2, pp. 61-65, as further specified in the specific citations to Mr. Arnett's testimony and exhibits as set forth above.

37. The Commission finds that the data Blue Ridge has provided to rebut the FCC Cable Rate's presumptions is reliable, and more accurately reflects the costs and the parties' use of Blue Ridge's distribution poles.

38. Ms. Kravtin's calculations applying the FCC Cable Rate formula rely on the rate formula's presumptions rather than actual data. If Blue Ridge's actual data,

as set forth above, is used, the resulting rates for 2014, 2015, and 2016, should be as follows:

<i>FCC Cable Rate</i>			
<i>(Using Actual Data)</i>			
	<u>2014</u>	<u>2015</u>	<u>2016</u>
Net Cost of a Bare Pole	\$ 262.73	\$262.19	\$258.30
x Carrying Charge Rate	27.74%	27.51%	27.87%
Annual Cost of Ownership (Per Pole)	\$ 72.88	\$72.13	\$71.99
x Space Allocation Factor	11.65%	11.60%	11.55%
Pole Attachment Rate	\$ 8.49	\$8.37	\$8.31

Evidence Supporting Finding of Fact No. 38—Evidence supporting this finding of fact is found in Mr. Arnett’s testimony, including Exhibit WA-33, attached thereto, detailing the calculations set forth above.

ii. **Alternative 2 – Modification of the FCC Cable Rate’s Space Allocation Formula with Respect to the Communications Worker Safety Zone.**

39. The Commission finds that the FCC Cable Rate’s application of the Communications Worker Safety Zone entirely and exclusively to Blue Ridge is inappropriate.

40. Blue Ridge is only required to set aside the Communications Worker Safety Zone because communications service providers have attached to its poles. The

NESC requires this set-off space between communications attachments and electric supply facilities in order to protect communications workers, who are not trained, qualified, or equipped to work with and around high voltage conductors, from coming into contact with energized electrical facilities. Electric utility workmen are necessarily trained and equipped to work with hazardous voltages, and thus do not benefit from the set-off space provided by the Communications Worker Safety Zone. Indeed, Charter's rate expert, Ms. Kravtin, admitted at hearing that "there's no need for the safety clearances" required by the Communications Worker Safety Zone until a communications company attaches to the pole. *See* Transcript, Vol. 5, p. 34.

41. Charter contends Blue Ridge benefits from the Communications Worker Safety Zone because the NESC allows electric utilities to install street lights less than 40 inches from communications facilities and Blue Ridge has, at times, installed street lights in this space. *However, Blue Ridge introduced uncontroverted evidence that it does not install streetlights in the Communications Worker Safety Zone.* Moreover, Blue Ridge would not have to provide the 40-inch Communications Worker Safety Zone if it did not have communications attachers on its poles. While the NESC allows streetlights to be installed in this space, it also allows streetlights to be installed in the electrical Supply Space. Thus, Blue Ridge could install shorter poles if it had no communications attachers, and it has to install taller poles solely to accommodate communications attachers, such as Charter.

42. Because the Communications Worker Safety Zone exists solely for the benefit of communications attachers, and not the electric utility, it is appropriate to

allocate the costs associated with this space equally among all attachers, including both Charter and Blue Ridge.

Evidence Supporting Findings of Fact Nos. 39-42—Evidence supporting this finding of fact is found in the testimony of Mr. Arnett, Transcript Vol. 2 pp. 54-57, in which he explains that the Communications Worker Safety Zone exists solely for the benefit of communications attachers, such as Charter, and that Blue Ridge would not have to set aside the Communications Worker Safety Zone if there were no communications attachers on the pole. In addition, Mr. Arnett responded to Charter's contentions regarding the placement of streetlights in the Safety Space, explaining (1) there is no evidence that Blue Ridge places streetlights in this space on anything other than an incidental basis, and (2) since the NESC allows electric utilities to place streetlights anywhere on the pole, including in the Supply Space, the Safety Space is not needed for that purpose, and thus Blue Ridge derives no benefit from this space, which it has to provide solely because a communications attacher, such as Charter, has attached to its pole. Finally, Ms. Kravtin admitted that the Communications Worker Safety Zone is not required until a communications company attaches to the pole during cross examination at hearing. See Transcript Vol. 5, p. 34.

43. Apportioning the Communications Worker Safety Zone equally among Blue Ridge's average 2.35 attachers (which includes Blue Ridge), Charter would be responsible for another 1.42 feet of usable space ($3.33 \div 2.35 = 1.417$) in addition to the 1.1 feet already attributed to its attachment using Blue Ridge's actual data, but using the FCC Cable Rate's presumptions regarding average pole height and the amount of useable space. This would result in a space allocation factor of 18.67 percent (2.52 feet

$\div 13.5$ feet of “Usable Space” = 0.1866).² Applying this space allocation factor to the FCC Cable Rate, and using Blue Ridge’s actual data, produces rates for 2014, 2015, and 2016 as follows:

FCC Cable Rate

Modified to Allocate Share of Communications Worker Safety Zone to Charter

	<u>2014</u>	<u>2015</u>	<u>2016</u>
<i>Net Cost of a Bare Pole</i>	\$ 262.73	\$262.19	\$258.30
<i>x Carrying Charge Rate</i>	27.74%	27.51%	27.87%
<i>Annual Cost of Ownership (Per Pole)</i>	<u>\$ 72.88</u>	<u>\$72.13</u>	<u>\$71.99</u>
<i>x Space Allocation Factor</i>	18.67%	18.67%	18.67%
<i>Pole Attachment Rate</i>	<u>\$13.59</u>	<u>\$13.47</u>	<u>\$13.44</u>

C. Costs and Concerns Justifying Contract Terms and Conditions

44. In addition to asking the Commission to determine a just and reasonable pole attachment rate, Blue Ridge and Charter have asked the Commission to resolve disputes over certain terms and conditions to be incorporated into a new pole attachment agreement between the parties.

45. Blue Ridge has asked the Commissions to approve a series of proposed contract terms that Charter accepted as part of the 2003 and 2008 Agreements. Blue Ridge submits that these terms and conditions are necessary to ensure that it is able to

² This space allocation does not incorporate the reduction of “usable space” required by the longer average spans between Blue Ridge’s poles, resulting in a higher average first point of attachment.

ensure the safety and reliability of its system and to allow it to recover costs that it would not incur “but for” Charter’s attachments, but that are not included in the annual pole attachment rate.

46. Charter’s attachments do cause Blue Ridge additional costs, expenses, and burdens, over and above those costs recovered through annual pole attachment rentals, which Blue Ridge would not incur if Charter were not attached to its poles. These “but for costs” generally fall into two categories: (a) code and safety violations that require correction and (b) administrative burdens associated with Charter’s attachments.

Evidence Supporting Findings of Fact Nos. 44-46—Evidence supporting these findings of fact is found in Mr. Layton’s testimony, Transcript Vol. 1, pp. 92-96, as well as the detailed findings of fact set forth below.

i. Charter Workmanship and Safety Violations

47. As a general matter, Charter has often failed to ensure its attachments comply with applicable safety and design standards, including the NESC, which has resulted in numerous code and safety violations.

Evidence Supporting Finding of Fact No. 47—Evidence supporting this finding of fact is found in Mr. Booth’s testimony, in which he details the numerous safety violations discovered among Charter’s attachments to Blue Ridge and other cooperatives’ system, *see* Transcript Vol. 3, pp. 76-83, as well as Mr. Layton’s testimony where he describes defects among Charter’s workmanship in making attachments to Blue Ridge’s poles. Transcript, Vol. 1, pp. 50-55, and exhibits attached thereto.

48. Charter employs no professional engineers to approve or review the design, construction or maintenance of its attachments. Charter's contractors likewise do not employ any professional engineers.

Evidence Supporting Finding of Fact No. 48—This finding of fact is supported by Mr. Martin's admissions during cross examination. See Transcript Vol. 4, pp. 122.

49. Charter uses contractors to install and perform virtually all work on its attachments to Blue Ridge's poles. However, Charter provides only minimal oversight over its contractors and their work on Blue Ridge's poles, and reviews at most ten to fifteen percent of its contractors' work.

Evidence Supporting Finding of Fact No. 49—This finding of fact is supported by the admissions of Mr. Mullins during cross examination. See Transcript Vol. 4, pp. 62.

50. Charter does not conduct safety inspections on its aerial facilities or attachments to Blue Ridge's poles, and it does not have any program for doing so. Instead, Charter only identifies safety issues if and when it comes across them in the course of performing other work. But, as Charter's Mr. Mullins conceded in his pre-filed testimony, Charter "generally relies on pole owners to conduct inspections of their aerial plant . . . and notify Charter when those inspections come across code issues related to Charter's plant"

Evidence Supporting Finding of Fact No. 50—This finding of fact is supported by Mr. Mullin's testimony and admissions during cross examination, see Transcript Vol. 3, pp. 257, Vol. 4, p. 60, as well as Mr. Martin's admissions at hearing. Transcript, Vol. 4, p. 126.

51. Although it was not meant as a safety inspection, Blue Ridge's 2015-16 Pole Audit identified more than 3,767 safety violations among Charter's attachments, which represents a 14% violation rate. Charter chose not to participate in this inventory, because, as Mr. Mullins acknowledged at hearing, "we [have] found their information is accurate."

Evidence Supporting Finding of Fact No. 51—This finding of fact is supported by Mr. Layton's direct testimony. Transcript, Vol. 1, pp. 52-54; 89-90, and Mr. Mullins' acknowledgements as hearing, Transcript Vol. 4, pp. 10-11.

52. In addition to the 2015-16 Pole Audit, Blue Ridge engaged Gregory Booth, P.E., to conduct a safety inspection of Charter's attachments on five representative circuits on Blue Ridge's system. This inspection revealed that Charter had at least one violation on 43% of the poles to which it was attached.

Evidence Supporting Finding of Fact No. 52—This finding of fact is supported by Mr. Booth's direct testimony, *see* Transcript, Vol. 3, pp. 75-79, as well as the records of his findings, *see* Exhibit GLB-5.

53. Blue Ridge's former Chief Operating Officer, Mr. Layton, and Mr. Booth, introduced numerous pictures showing violations of the NESC and other safety concerns among Charter's attachments on Blue Ridge's system. As shown in those pictures, Charter's violations include: (i) obvious public safety hazards, including failure to provide proper clearance for Charter's lines over roads, driveways, and fields; (ii) cable facilities lying on the ground or wrapped around poles; (iii) improper or missing guys, including guys installed too close to cooperatives' anchors; (iv) excess equipment attached to poles; (v) climbing impediments caused by Charter's risers,

electrical supplies, and other facilities, which impede the work of electric company linemen; (vi) vehicular impediments created by Charter's ground-based equipment that create obstructions for bucket trucks; (vii) failures to bond Charter's facilities to electrical grounds; and (viii) failure to use proper equipment in climates, such as coastal areas, that expose facilities to greater than normal corrosion.

Evidence Supporting Finding of Fact No. 53—Evidence supporting this finding of fact is found in the testimony of Mr. Layton, *see* Transcript, Vol. 1, pp. 54-55, 94-97, Exhibit LL-16A through LL-16-E. It is also supported by the Mr. Booth's testimony. Transcript Vol. 3, pp. 77-81, and the pictures shown in Exhibit GLB-3.

54. In addition to these safety hazards, Blue Ridge also introduced evidence that Charter regularly attaches its facilities in the Supply Space allocated to Blue Ridge. This occurs when either (i) Charter attaches less than 3.33 feet (40 inches) from Blue Ridge's electrical facilities, thereby failing to allow the proper separation for the Communications Worker Safety Zone, or (ii) Charter attaches too high on the pole, effectively preventing Blue Ridge from using its allocated space to add additional facilities, such as transformers or other equipment, without having to issue a request that Charter transfer or relocate its facilities.

55. Charter contends these "safety space" violations are the fault of Blue Ridge, which "builds down" additional electrical facilities on the pole after Charter's contractors have attached Charter's facilities. This, however, ignores that the first cause of this issue occurs when Charter fails to observe the Communications Worker Safety Zone by attaching its facilities less than 40 inches from the Supply Space allocated to Blue Ridge. But regardless of the order in which the parties install

attachments on the pole, when Charter fails to leave at least 40 inches of clearance between its attachments and the Supply Space allocated to Blue Ridge, it denies Blue Ridge the full benefit of the Supply Space allocated to it and prevents Blue Ridge from later using that space without having to first require Charter to relocate its attachments, which causes additional delay and expense.

Evidence Supporting Findings of Fact Nos. 54-55—Evidence supporting these findings of fact is found in Mr. Layton’s testimony, Transcript, Vol. 1, pp. 52-54, as well as Mr. Booth’s testimony, Transcript Vol. 3, pp. 115-118.

56. Rather than accept responsibility for the safety violations it has caused, or attempt to resolve them in a cooperative manner, Charter has shown a propensity to unjustifiably litigate each one. Indeed, Charter’s response to the specific safety violations Mr. Layton and Mr. Booth identified in their testimony reveals Charter will argue over which party caused violations even where responsibility is clear. In one instance, Mr. Mullins argued that Blue Ridge must have been at fault for safety space violations, because Charter’s plant had been in place for “more than 30 years”—even though the pole at issue bore a 1998 date stamp and had been subject to relocation requests. Elsewhere, Mr. Mullins asserted that Charter should not be responsible for ground clearance violations, because the telephone attacher—which was attached above Charter’s lines—would have to relocate its attachments before Charter could correct the violation. Mr. Mullins went so far that, in response to one violation—involving a climbing space violation where Charter attached communications boxes and risers on both sides of a *transmission* pole—he attached a

carefully taken picture that obscured Charter's equipment in order to argue it had not attached any communication box at all. The bolts attaching the communications box, however, were still visible.

Evidence supporting Finding of Fact No. 56—Evidence supporting this finding of fact is found in the testimony of Mr. Lee Layton, responding to Mr. Mullin's explanations, *see* Transcript, Vol. 1, pp. 92-98, and Mr. Mullins's admissions on cross examination, Transcript Vol., pp. 46-48.

ii. Additional Costs and Expenses of Charter Attachments

57. Aside from the costs and burdens caused by Charter's code and safety violations, Charter's attachments cause Blue Ridge additional costs and expense, which Blue Ridge would incur even if Charter's attachments were made in a proper and workmanlike manner. These are as follows:

- a) the burden and cost of administering Charter's attachment agreement, including processing, reviewing, and tracking Charter's permits and applications for new attachments, as well as conducting engineering to design higher poles and relocate Blue Ridge's electrical facilities when Charter requires "make ready" work to accommodate its attachments;
- b) "field" issues with Charter's attachments, such as (i) the cost of inspecting Charter's attachments; (ii) conducting field inspections to verify Charter's permit requests and verifying Charter's compliance with design requirements after

completion, (iii) coordinating and resolving requests to transfer Charter's facilities, (iv) delay and repeated mobilization costs when Charter fails to transfer its facilities, or fails to do so timely, as required by the parties' agreement, (v) identifying and remedying safety violations;

- c) the burden and cost of having to conduct pole attachment inventories and safety inspections to determine and verify the number and types of attachments Charter has made to Blue Ridge's system; and
- d) legal exposure to Blue Ridge that may result from Charter's operations on Blue Ridge's facilities, or from injuries to the public as a result of Charter's attachments to Blue Ridge's poles.

Blue Ridge would not incur these costs *but for* Charter's attachments to its poles, and it is appropriate to require any pole attachment agreement between the parties to include terms and conditions that either prevent Blue Ridge from incurring these costs and burdens or allow Blue Ridge to recover them from Charter if and to the extent Blue Ridge does incur them.

Evidence Supporting Finding of Fact No. 57—Evidence supporting this finding of fact is found in Mr. Layton's testimony, *see* Transcript, Vol. 1, pp. 55-59, as well as the testimony of Mr. Booth. *See* Transcript, Vol. 58-60.

58. Charter's failure to comply with its contractual obligations, and in particular to timely respond to requests to move or transfer its facilities as required by the parties' pole attachment agreement, causes Blue Ridge additional burden and

expense. Reports from the National Joint Use Notification System (“NJUNS”), which Blue Ridge and Charter use for such requests, showed Charter had failed to respond to nearly 139 currently outstanding transfer requests for which it was the next to go, and that nearly a quarter of those had been outstanding for more than three years. These failures to respond to transfer requests cause Blue Ridge significant burden and expense. Blue Ridge issues transfer requests in order to, among other things, install transformers to serve new customers, replace old poles, and relocate existing distribution lines. If Blue Ridge is installing a transformer to provide service to a new member, Charter’s failure may delay Blue Ridge’s ability to connect electricity to the members’ home. Likewise, if Blue Ridge is replacing or moving existing poles and Charter fails to timely respond to its transfer requests, Ridge will be forced to leave the old poles in place, cannot complete its work, and may have to re-mobilize crews to complete the work when or if Charter finally complies. The costs Blue Ridge incurs as a result of these delays are difficult to estimate, and cannot be fully recouped merely by paying the costs to re-mobilize crews when Charter completes its transfer.

Evidence Supporting Finding of Fact No. 58—Evidence supporting this finding of fact is found in the testimony of Mr. Layton, Transcript, Vol. pp. 31-31.

III. CONCLUSIONS AND DISCUSSION

Based on the foregoing findings of fact, the Commission makes the following conclusions:

1. Section 62-350 requires electric cooperatives, such as Blue Ridge, to “allow any communications service provider to utilize its poles . . . at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements.” N.C.G.S. § 62-350(a). In determining pole attachment rates and resolving disputes between communications attachers and cooperatives, Section 62-350 directs the Commission as follows:

The Commission . . . shall adjudicate disputes arising under this section on a case-by-case basis. The Commission shall not exercise general rate-making authority over communication service provider utilization of municipal or membership corporation facilities. . . . The Commission, in its discretion, may consider any evidence or rate-making methodologies offered or proposed by the parties and shall resolve any dispute identified in the filings consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions.

Id. Thus, the statute requires the Commission to adjudicate disputes, such as this one, on a “case-by-case basis” and to consider, in its discretion, any rate-making methodologies offered or proposed by the parties in deriving just and reasonable rates, terms, and conditions, consistent with the public interest.

A. Rate Methodology

2. After carefully considering the TVA Rate and FCC Cable Rate methodologies, as well as the other various rate methodologies identified by the parties’ respective experts, the Commission concludes the TVA Rate provides the most appropriate method for deriving a just and reasonable annual pole attachment rate for Charter’s attachments to Blue Ridge’s poles.

3. As set forth in the TVA's decision approving its rate methodology, the TVA Rate is designed to ensure electric utilities are appropriately compensated for the use of their poles, that electric rates remain as low as feasible, and that electric rate payers are not required to subsidize the business activities of communications companies that attach to a power companies poles. The TVA Rate accordingly allocates the costs associated with space on a pole in a just and reasonable manner, properly recognizing that (i) all attachers benefit equally from the 24-foot "Support Space" and (ii) the 3.33 feet of "Safety Space" set aside to allow for the Communications Worker Safety Zone should be allocated to communications attachers, and not the electric cooperative.

4. In contrast to the TVA Rate, the FCC Cable Rate proposed by Charter is insufficient to adequately compensate electric cooperatives, such as Blue Ridge, for the use of their poles and therefore does not produce a just and reasonable pole attachment rate. Indeed, the FCC Cable Rate methodology was designed to result in low pole attachment rates in order to encourage or incentivize communications companies to invest in the expansion of broadband internet. The FCC Cable Rate methodology accomplishes its goal of subsidizing broadband in setting the Space Allocation Factor to allocate to the communications attacher only a small portion of the space it actually uses. Thus, even though all attachers need the Support Space, and benefit equally from it, the FCC Cable Rate only allocates a small percentage of this space (7.41%) to cable attachers such as Charter. Likewise, application of the FCC Cable Rate would require Blue Ridge to share in the costs of the Safety Space—and indeed would allocate the

bulk of that space to Blue Ridge—even though the Safety Space only benefits communications attachers and would not be required if there were no communications attachers on Blue Ridge’s poles.

5. Adopting the FCC Cable Rate would inappropriately require Blue Ridge’s ratepayers, who are its members, to subsidize Charter’s business. While the FCC has deemed it appropriate to establish such a regime when regulating the pole attachment rates IOUs charge under Section 224 of the Communications Act, there are several reasons why doing so here would be inappropriate and contrary to the public interest.

6. *First*, Congress has chosen to expressly exempt electric cooperatives, such as Blue Ridge, from regulation under Section 224 of the Communications Act. According to the legislative history, Congress did so based on a recognition that an electric cooperative’s members, who are customers of electricity and potential customers of cable services, are best positioned to make decisions regarding the allocation of pole costs among electric utilities and cable companies. *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in*, 1978 U.S. Code Cong. & Ad News 109, 126 (observing that “pole attachment rates charged by municipally owned and cooperative utilities are already subject to a decision making process based upon constituent needs and interests”).

7. *Second*, while the expansion of broadband may be desirable, it would be inappropriate to require Blue Ridge’s members to subsidize it. As a non-profit, member-owned electric cooperative formed under the North Carolina Electric

Membership Corporation Act, N.C.G.S. § 117-6, *et seq.*, Blue Ridge is charged with providing electricity to rural areas of the State in a nondiscriminatory manner “at the *lowest cost* consistent with sound economy and prudent management.” *See* N.C.G.S. § 117-10 (emphasis added); *see also* N.C.G.S. § 117-16.1 (prohibiting discrimination in rates or services). It is also required to operate solely for the benefit of its members, who are the customers of its electricity. *See* N.C.G.S. § 117-16. Requiring Blue Ridge and its members to subsidize Charter’s business by establishing artificially low pole attachment rates would necessarily result in Blue Ridge’s members bearing more of the costs associated with Charter’s attachments, ultimately driving up electricity costs and hampering Blue Ridge’s obligation to provide power to its members at the lowest possible cost.

8. *Third*, even if it were appropriate to require Blue Ridge to charge Charter a low pole attachment rate to promote the expansion of broadband internet—which it is not—there is no evidence that doing so would actually cause Charter to expand its broadband services, much less extend those services to Blue Ridge’s members. Indeed, at hearing, Ms. Kravtin was forced to concede her arguments regarding the expansion of broadband rest only on a “generic analysis,” and not any evidence specific to Charter or its facilities in Blue Ridge’s territory. *See* Transcript, Vol. 5, pp. 102-03.

9. *Finally*, granting a low pole attachment rate to Charter in order to promote broadband would require Blue Ridge’s members, most of whom will never have the opportunity to purchase Charter’s services, to subsidize Charter’s operations.

Charter has no obligation to serve Blue Ridge's members, or anyone else. Moreover, as was shown at the hearing, Charter has chosen to serve only the most densely populated portions of Blue Ridge's territory. As a result, adopting the FCC Cable Rate would require Blue Ridge and its members to transfer substantial value to Charter, without any guarantee that doing so would actually result in the extension of broadband services to customers in the Blue Ridge service territory.

10. Charter also argues the Commission should follow the North Carolina Business Court's decision in *Rutherford Electric Membership Corporation v. Time Warner Entertainment*, No. 13 CVS 231, 2014 WL 2159382, at *1 (N.C. Super. May 22, 2014), *aff'd sub nom. Rutherford Elec. Membership Corp. v. Time Warner Entm't-Advance/Newhouse P'ship*, 240 N.C. App. 199, 771 S.E.2d 768 (2015), which approved the FCC Cable Rate formula as just and reasonable. That case, however, was decided under the previous version of Section 62-350 and prior to TVA's approval of its rate methodology. Indeed, shortly after the *Rutherford* case was decided, the General Assembly amended Section 62-350, to (1) to move exclusive jurisdiction over cases like this one from the Business Court to this Commission, and (2) remove any reference to the FCC's pole attachment rates from the statute. *See* N.C. Sess. L. 2015-119. The current version of the statute now provides that "[t]he Commission, in its discretion, may consider any evidence or rate-making methodologies offered or proposed by the parties" in setting just and reasonable pole attachment rates. *See* N.C.G.S. § 62-350(c). The Commission, therefore, is not bound by the Business

Court's decision in the *Rutherford* case and it is free to determine that other rate methodologies are just and reasonable and better serve the public interest.

11. Accordingly, for each of the foregoing reasons, we find that the TVA Rate formula produces a just and reasonable pole attachment rate, consistent with the public interest, and hereby adopt that methodology in setting pole attachment rates for Charter's attachments to Blue Ridge's poles.

B. Alternative, Additional Conclusions Regarding Rate Methodology

[In the event the Commission adopts the FCC Cable Rate, Blue Ridge requests the Commission adopt the following additional Conclusions (1) approving use of Blue Ridge's actual data when applying the FCC Cable Rate and (2) modifying the FCC Cable Rate's space allocation formula to apportion the Communications Worker Safety Zone equally among all attachers.]

i. Alternative 1 – Application of Actual Blue Ridge Data to FCC Cable Rate

12. The parties disagree as to whether the Commission should use figures drawn from Blue Ridge's actual data in order to determine the rate for Charter's attachments to Blue Ridge's distribution poles or whether it should instead use the rebuttable presumptions under the FCC Cable Rate.

13. The FCC, for its part, does not require parties to use the FCC Cable Rate's presumptions, but instead allows pole owners to rebut those presumptions where actual data is available. *See* 47 C.F.R. § 1.1418 (providing that the presumptions regarding space occupied by cable company's attachment, the amount of usable space, and average pole height "may be rebutted by either party").

14. Although Charter's rate expert contends that the Commission should use presumptions rather than actual data when applying the FCC Cable Rate, she herself recognizes that actual data may be used in lieu of the FCC Cable Rate's presumptions in her written testimony, where she writes:

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

Transcript, Vol. 4, pp. 187 (emphasis added).

15. Section 62-350, requires the Commission to set just and reasonable pole attachment rates "on a case-by-case basis." N.C.G.S. § 62-350(c). Thus, while Charter argues the Commission should apply the "presumptions" used as default values by the FCC in calculating the FCC Cable Rate, the Commission concludes that it is appropriate to use actual data where, as in this case, such data is available.

16. As set forth above, Blue Ridge has provided actual data, drawn from its accounting and continuing property records, rebutting the FCC's presumptions regarding (i) the average number of attachers on Blue Ridge's system; (ii) the average height of Blue Ridge's poles; (iii) the average height of the first attachment, and thus the amount of usable and unusable space, on Blue Ridge's poles; (iv) the proper "appurtenance factor" to be applied to Blue Ridge's pole accounts in determining its annual pole costs; and (v) the amount of space occupied by Charter's attachments. The Commission finds and concludes that this data should be used in determining the rate

for Charter's attachments to Blue Ridge's poles when using the FCC Cable Rate, as set forth above.

ii. **Alternative 2 -- Modification of the FCC Cable Rate's Space Allocation Formula with Respect to the Communications Worker Safety Zone**

17. The Commission observes that, as Congress recognized when it passed the original 1978 Pole Attachment Act, the space allocation factor used to apportion pole costs between Blue Ridge and its attachers involves "equity considerations." *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in*, 1978 U.S. Code Cong. & Ad News 109, 126. (observing that "ultimately, CATV pole attachment ratesetting involves equity considerations"). The Commission therefore concludes that it is appropriate to consider modifications to the FCC Cable Rate's space allocation formula to derive a just and reasonable rate.

18. The Commission concludes that the FCC Cable Rate's allocation of the Communications Worker Safety Zone entirely, and exclusively, to Blue Ridge is inappropriate and inequitable for several reasons.

19. *First*, as set forth above, the Communications Worker Safety Zone exists primarily, if not exclusively, for the benefit of communications companies and their workers, who are not trained, qualified, or equipped to work around high voltage conductors. Blue Ridge would not have to install poles that provide the 3.33 feet of space for the Communications Worker Safety Zone if there were no communications attachers on Blue Ridge's poles. Instead, Blue Ridge could install shorter, less expensive, poles if it had no communications attachers.

20. *Second*, while Charter contends Blue Ridge benefits from the Communications Worker Safety Zone because the NESC allows electric utilities to install streetlights in this space, *the uncontroverted evidence in this case shows Blue Ridge does not install streetlights or any other facilities in this space*. Moreover, the NESC also allows Blue Ridge to install streetlights in the electric supply space, and thus Blue Ridge does not require the Communications Worker Safety Zone in order to install streetlights.

21. *Third*, Charter's position that the Commission should allocate the Communications Worker Safety Space entirely to Blue Ridge runs contrary to the economic theories Charter argues support the FCC Cable Rate in the first place. In her testimony, Charter's rate expert, Ms. Kravtin, asserts that the FCC Cable Rate rests on the "fundamental economic principle of cost-causer pays"—meaning that an attacher should pay for all costs that would not be borne by the utility, but for the attachment. *See Transcript*, Vol. 4, p. 184. However, on cross examination, Ms. Kravtin conceded that the Communications Worker Safety Zone would not be required *but for* the presence of communications companies' attachments. *See Transcript*, Vol. 5, p. 34 (admitting that, until a communications company attaches to a pole, "there's no need for those safety clearances"). In other words, it is the presence of a communications attacher, not Blue Ridge's facilities, that causes the need to have the Communications Worker Safety Zone. Even if the Commission were to adopt the principle of "cost-causer-pays," which Charter advocates, it would require the Commission to allocate the Communications Worker Safety zone to Charter, not Blue Ridge.

22. Based on the foregoing, the Commission determines that it would be inappropriate to allocate the costs associated with the Communications Worker Safety Zone entirely and exclusively to Blue Ridge. The Commission therefore concludes that the FCC Cable Rate's space allocation formula should be modified to allocate the costs of the Communications Worker Safety Zone equally among all attachers (including Charter and Blue Ridge), as set forth above, and adopts this modification in determining the just and reasonable rates for Charter's attachments to Blue Ridge's poles.

C. Terms and Conditions

23. Blue Ridge and Charter have asked the Commission to resolve disputes over certain terms and conditions to be incorporated into a new pole attachment agreement between the parties.

24. Specifically, Blue Ridge has asked that the Commission approve terms and conditions that were part of the parties' 2003 and 2008 Agreements for use in a new pole attachment agreement regarding the following topics: (1) Requirements regarding new attachments, overloading, and drop poles (a/k/a secondary poles); (2) Disputed Invoices; (3) Engineering Certification; (4) Maintenance and Transfers; (5); Non-Compliant Attachments; (6) Insurance; (7) Default Remedies; (8) Indemnity; (9) Reservation of Space; and (10) Recovery of Space.

25. Regarding each of these topics, Blue Ridge has proposed the same terms and conditions that were included in the parties' 2003 and 2008 Agreements, both of which use the same form. The fact that Charter has agreed to these terms and

conditions twice before, and operated under them for more than a decade, is strong evidence that they are reasonable. Although Charter now complains that these provisions are somehow “unfair,” the uncontroverted evidence shows that Charter never requested any changes to the language of the 2003 or 2008 Agreements when it negotiated them, but instead chose to focus only on the rate for its attachments. Moreover, while Charter and Blue Ridge entered the 2003 and 2008 Agreements prior to the enactment of Section 62-350, there is no evidence to suggest that these agreements are anything other than the product of arms-length negotiations between the parties.

26. The terms Blue Ridge has proposed are also consistent with those in its agreements with other third-party attachers. Although Charter claims that Blue Ridge has attempted to “single out” Charter by seeking to impose more stringent contract terms than those concerning attachers, this does not appear to be the case. First, in making this argument, Charter’s witnesses inappropriately focused their efforts on comparing the terms of Charter’s agreements with Blue Ridge to the terms of Blue Ridge’s contracts with joint users. However, because joint use agreements involve arrangements between two pole owners to use one another’s poles, they are fundamentally different from agreements with third-party attachers, like Charter. Second, Blue Ridge’s 2013 agreement with Morris Broadband—the only third-party attacher with whom Blue Ridge has signed a new agreement since the passage of Section 62-350—uses the same form as Blue Ridge’s 2003 and 2008 Agreements with Charter and thus contains the same terms and conditions Blue Ridge proposes here.

27. Finally, while Charter disputed them during the course of the parties' negotiations, Charter's witnesses acknowledged during the course of the hearing that several of Blue Ridge's proposed terms and conditions were, in fact, reasonable, resolving any dispute between the parties regarding these topics.

28. The Commission addresses each of the proposed terms and conditions the parties have submitted for resolution, in turn, below:

i. Applications for New Attachments

29. Article 5 of the 2003 and 2008 Agreements required Charter to submit an application, pay an application fee, and obtain a permit from Blue Ridge for each attachment to Blue Ridge's mainline poles, following a procedure set out in the agreements. During the course of the parties' negotiations, however, Charter refused to agree to these same provisions and instead proposed that it should only be required to submit applications for projects that involve ten or more attachments.

30. It appears Charter no longer disputes Blue Ridge's proposals governing applications for new attachments. In his written testimony, Mr. Martin conceded that, despite its negotiating position, Charter is willing to agree to the permitting procedures for attachments to mainline poles set forth in the 2008 Agreement. *See* Transcript, Vol. 4, p. 86.

31. Accordingly, the Commission concludes that Blue Ridge's proposed terms and conditions to govern applications and permitting of new attachments, as set forth in Article 5 of the 2003 and 2008 Agreements, is just and reasonable and is appropriate for inclusion in a new pole attachment agreement between the parties.

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

32. Article 6 of Charter’s 2003 and 2008 Agreements with Blue Ridge allow Charter to make attachments to so-called “Secondary Poles” or “Drop Poles”—which are poles installed solely to provide ground clearance on a service loop to a single customer’s home—without seeking prior approval from Blue Ridge, and instead allow Charter to submit permit applications for all attachments to secondary poles after-the-fact at the end of each month, along with a certification that those attachments are made in compliance with the NESC, other safety standards, and the requirements of Charter’s contract with Blue Ridge.

33. Despite having agreed to submit monthly reports of the attachments it makes to secondary poles on Blue Ridge’s system, Mr. Mullins admitted during hearing that Charter, which uses contractors to install attachments to secondary poles, has no way to track those attachments. Instead, Charter has offered that Blue Ridge could “reconcile” secondary attachments by conducting inventories of its attachers every five years, with Charter agreeing to pay five years’ “back rent.” This proposal is unreasonable and inadequate to protect Blue Ridge’s interests. The permitting process under the agreement provides Blue Ridge an opportunity to ensure accurate accounting of Charter’s attachments as well as an opportunity to ensure Charter has made its attachments to secondary poles in compliance with the NESC and the requirements of the parties’ contract.

34. Accordingly, the Commission concludes that Blue Ridge’s proposed terms and conditions to govern applications and permitting of new attachments, as set

forth in Article 6 of the 2003 and 2008 Agreements, is just and reasonable and is appropriate for inclusion in a new pole attachment agreement between the parties.

iii. Overlashing

35. Article 7 of Charter's 2003 and 2008 Agreements with Blue Ridge required Charter to provide prior notice and follow the permitting process set forth in the agreement before "overlashing" additional cables to its existing attachments on Blue Ridge's system (but not to pay pole attachment fees thereafter). "Overlashing" is a method Charter uses to add aerial facilities by running new cable (or cables) over an existing cable and then lashing them together.

36. It is reasonable for Blue Ridge to require Charter to seek prior approval before overlashing additional cables over its existing attachments to Blue Ridge's poles. First, overlashing multiplies the surface area of Charter's cables, substantially increasing wind and ice loads on Blue Ridge's poles. As Mr. Booth testified, the NESC, specifically Sections 25 and 26, requires that an attacher conduct analysis, design, and strengthening to ensure that and attachments are sufficient to accommodate overlashed facilities. Yet, despite this requirement, Charter's witnesses admitted at hearing that Charter does not conduct any such analysis. Blue Ridge, accordingly should have the opportunity to review and determine whether to request Charter engage in additional analysis before it overlashes additional cables to Blue Ridge's poles. Second, because overlashing necessarily involves work by Charter and its

contractors of Blue Ridge's facilities, it is reasonable for Blue Ridge to require prior notice before Charter does any overloading work.

37. Accordingly, Commission concludes that Blue Ridge's proposed terms and conditions requiring prior approval for overloading, as set forth in Article 7 of the 2003 and 2008 Agreements, is just and reasonable and is appropriate for inclusion in a new pole attachment agreement between the parties.

iv. Disputed Invoices

38. Section 4.2 of the Parties 2003 and 2008 Agreements required Charter to pay Blue Ridge's monthly invoices for attachments fees within 30 days. In negotiating a new agreement, however, Charter has insisted on provisions that would allow it to withhold payment on any "disputed" invoices until the dispute is resolved. While Blue Ridge agrees that it is appropriate for Charter to have a mechanism to dispute invoices, it argues Charter should be required to pay any outstanding invoices pending resolution of the dispute.

39. Charter's proposal would create an incentive for Charter to dispute legitimate amounts owed to Blue Ridge and work less than efficiently to resolve disputes when they arise. As Blue Ridge's witnesses testified during the hearing, this is a real concern given that Charter failed to pay at least two invoices during 2017 for "make ready" work to install taller poles and additional facilities in order to accommodate Charter's attachments.

40. Accordingly, the Commission concludes that Blue Ridge's proposed terms requiring Charter to pay disputed invoices pending resolution of the dispute are

just and reasonable and are appropriate for inclusion in a new pole attachment agreement between the parties.

v. *Engineering Certification*

41. Section 5.9 of Charter's 2003 and 2008 Agreements with Blue Ridge both required Charter to provide, within 30 days after completing the last attachment covered by an application, a certification from a professional engineer that Charter's attachments to Blue Ridge's poles "are of sound engineering design, fully comply with the [Rules specified in the agreement], th[e] agreement and the latest addition of the National Electric Safety Code, and were constructed as provided in the Make Ready Engineering Plans" Charter provided in its application. The agreements required Charter to make this certification in a form attached to the agreements as an exhibit, which requires a professional engineer's signature.

42. Charter, despite having agreed to these provisions twice before without any request for modification, has refused to accept them in its current negotiations with Blue Ridge, and instead proposes that it (i) should be allowed to provide certification from an "authorized representative," and (ii) should not have to provide any certification with respect to secondary or "drop" poles that serve a single house.

43. Charter's proposal that it provide a certification from only "an authorized representative"—which could be any employee—is inadequate to address Blue Ridge's safety concerns and assure it that Charter's attachments comply with the NESC and applicable safety standards. Moreover, it would be unlawful for one of Charter's employees to certify that Charter's attachments are of "sound engineering

design and fully comply” with the NESC and other design specifications, unless he or she is licensed engineer. *See* N.C.G.S. §§ 89C-2 and 89C-3. At hearing, Mr. Booth, himself a licensed professional engineer, introduced guidance he received from the North Carolina Board of Examiners for Engineers and Land Surveyors, advising that providing such a certification would require a professional engineer’s license under N.C.G.S. § 89C-3(6), and that doing so without a license would violate N.C.G.S. § 89C-2.

44. Accordingly, Commission concludes that Blue Ridge’s proposed terms and conditions requiring Charter to provide a certification for a licensed professional engineer that its attachments are of sound engineering and comply with applicable design and safety standards, as set in its 2003 and 2008 Agreements with Charter, are just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

vi. Maintenance and Transfers

45. Section 9.6 of Charter’s 2003 and 2008 Agreements with Blue Ridge required that it would transfer attachments to a new pole, or relocate them, within sixty (60) days of receiving a request from Blue Ridge through the NJUNS system. Charter also agreed that, if it failed to transfer its facilities in this time period, it would pay “Unauthorized Attachment” fees, as provided by the agreement, and would also pay Blue Ridge’s expenses to the extent it had to send out additional crews or do additional work as a result of Charter’s delay

46. These provisions are reasonable and necessary to protect Blue Ridge,

which requires adequate contractual protection to ensure Charter complies with its transfer requests and reimburses Blue Ridge's for the administrative burden, costs, and delays Charter causes when it fails to timely respond to those requests. As set forth above, Blue Ridge issues transfer requests in order to, among other things, install transformers to serve new customers, replace old poles, and relocate existing distribution lines. If the request is to install a new transformer, Charter's failure to respond to a transfer request may delay Blue Ridge's ability to connect electricity to the members' home. Likewise, if Blue Ridge is replacing or moving existing poles, Charter's failure to timely respond may prevent Blue Ridge from completing its work or require it to re-mobilize crews when or if Charter finally complies. The full amount of these costs is difficult to determine and is not likely to be fully recovered by billing for costs to remobilize work crews alone. Accordingly, Blue Ridge's proposal to assess fees against Charter in the event it fails to timely respond to transfer requests, in addition to remobilization charges, is just and reasonable.

47. Accordingly, Commission concludes that Blue Ridge's proposed terms and conditions regarding maintenance and transfers, as set forth in Section 9.6 of the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

vii. Non-Compliant Attachments

48. Article 11 of the 2003 and 2008 Agreements required that Charter provide a plan to correct non-compliant attachments or safety violations within forty-five (45) days of receiving a notice from Blue Ridge (through NJUNS), which

then must be approved and completed in accordance with a timeline set forth in the agreements. The same article allowed Blue Ridge to revoke permits for attachments if Charter failed to respond to its notices. *Id.* Yet, in the current negotiations, Charter has insisted that it should only have to respond to Blue Ridge's notices within an undefined, "reasonable time." It also has insisted that it should not have to pay to correct non-compliant attachments unless Blue Ridge can prove Charter "caused" the violation, and that Blue Ridge should not have the right to revoke Charter's permit if it fails to correct the violation.

49. Charter's proposals are insufficient to resolve the well-documented issues concerning its non-compliant attachments and the serious issues posed by Charter's numerous safety violations. Blue Ridge must have an adequate contractual mechanism to require Charter to correct safety violations and other deficiencies in its attachments, which must include definite timelines for responses and remedies if Charter fails to make progress toward correcting them. Moreover, Charter's insistence that it should only be required to correct non-compliant attachments if Blue Ridge can show Charter "caused the violation," is an invitation for endless dispute.

50. Accordingly, Commission concludes that Blue Ridge's proposed terms and conditions governing non-compliant attachments, as set forth in Article 11 of the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

viii. Insurance

51. Article 20 of the 2003 and 2008 Agreement required Charter agree to maintain coverages for worker's compensation, commercial general liability, and automobile liability insurance. Yet, despite having agreed to this requirement in both the 2003 and 2008 Agreements, Charter now has objected, and insists that it is willing to maintain only such coverages "as determined by Charter's risk management."

52. Blue Ridge's proposed insurance requirements are reasonable. As Blue Ridge's witnesses explained, the Rural Utilities Service, the government agency that provides loans to finance construction of Blue Ridge's system, mandates all of its borrowers require third parties working on their system to provide proof of such insurance and to maintain the levels of insurance set forth in its proposed terms and conditions. *See* 7 C.F.R. § 1788.48. Charter's position—that it only be required to maintain levels of insurance "as determined by Charter's risk management— amounts to no commitment at all, as it would allow Charter to drop or decrease its coverage at any time. It is also insufficient to meet RUS's requirements.

53. Accordingly, Commission concludes that Blue Ridge's proposed terms and conditions requiring Charter to maintain specified levels of insurance, as set forth in Article 20 of the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

ix. Default Remedies

54. Article 23 of the 2003 and 2008 Agreements included well-defined

provisions establishing the parties rights in the event of default, including rights to notice and cure. In the course of the parties' negotiations for a new pole attachment agreement, however, Charter refused to agree to reasonable default provisions, and instead proposed language that would severely limit Blue Ridge's rights in the event Charter failed to perform its contractual obligations.

55. It appears Charter no longer disputes Blue Ridge's proposed default provisions. In his testimony, Mr. Martin proposes a default provision that he asserts "is consistent with the 2008 agreement." *See* Martin Test., Vol. 107. While Mr. Martin proposes different language, it appears Charter finds the default provisions in the 2008 Agreement acceptable.

56. Accordingly, Commission concludes that Blue Ridge's proposed terms and conditions governing default remedies, as set forth in Article 23 of the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

x. Indemnity

57. Article 24 of the 2003 and 2008 Agreements included indemnity provisions that required Charter to indemnify and defend Blue Ridge against claims arising from Charter's operations or attachments. Blue Ridge also agreed, in the same provisions, to hold Charter harmless for any and all claims that arise solely from Blue Ridge's actions, omissions, or negligence, but not to indemnify Charter for third party claims. Despite having agreed to these provisions in its prior agreements, Charter now insists that any indemnity provision should be "mutual" or "reciprocal."

58. Blue Ridge's proposed indemnity provisions are reasonable given the parties' prior agreements and their statutory relationship. Not only has Charter accepted them twice before, but it would be inappropriate to require Blue Ridge to indemnify Charter, given that Blue Ridge has no choice but to allow Charter on its poles.

59. Accordingly, Commission concludes that Blue Ridge's proposed terms and conditions governing the parties' indemnity obligations, as set forth in Article 24 of the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

xi. Reservation of Space

60. Paragraph D.12 of the "Rules and Practices of Owner for Attachments" attached and incorporated into the 2003 and 2008 Agreements, required Charter to attach its facilities at least 72 inches below Blue Ridge's grounded neutral, to ensure Blue Ridge had sufficient clearance on the pole to install future electric facilities without requiring Charter to relocate or transfer.

61. As Blue Ridge's witnesses explained during the hearing, the purpose of this "reservation of space" provision is ensure Blue Ridge is able to use the electric supply space that is allocated to it (and for which it pays under the applicable rate formulas), and that it is able to install additional facilities, such as transformers to provide service to new customers, while still maintaining the 40 inches of vertical clearance between Charter's attachments and Blue Ridge's energized conductors required by the NESC. Reserving this space eliminates or reduces the need for Blue

Ridge to issue transfer or relocation requests to Charter. Blue Ridge has provided instructions, in the form of a specification manual, to all of its attachers requiring this space (or its equivalent, depending on the order in which the parties attach) since at least 2006. Moreover, Blue Ridge introduced evidence that this requirement is not arbitrary, as Charter contends, but instead is the result of engineering designs for a fully built-out poles based on RUS specifications.

62. Charter at least implicitly acknowledges that Blue Ridge's "reservation of space" provision requiring Charter to attach its facilities at least 72 inches from Blue Ridge's neutral is reasonable and appropriate. On cross examination, Mr. Mullins testified that Charter's current agreement with Blue Ridge requires Charter to observe this 72 inch requirement unless it obtains permission from Blue Ridge to attach closer. He also testified that Charter instructs its contractors to comply with this requirement when making attachments to Blue Ridge's poles.

63. Accordingly, Commission concludes that Blue Ridge's proposed terms regarding "reservation of space," which requiring Charter to make its attachments at least 72 inches below Blue Ridge's grounded neutral, as set forth in Paragraph D.12 of the "Rules and Practices of Owner for Attachments" attached and incorporated into the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

xii. Recovery of Space

64. Article 15 of the 2003 and 2008 Agreements provided that, if Blue Ridge required additional space on its poles, Charter must move or relocate its

facilities, within 30 days of receiving notice (or within 10 days if the space is needed in order for Blue Ridge to provide electrical service to one of its members).

65. Though Charter disputed Blue Ridge's proposed "recovery of space" provision in the course of the parties' negotiations, it appears Charter now views it as acceptable. In his written testimony, Mr. Martin conceded that "Charter would agree to reasonable language similar to the language in the 2008 agreement that allows Blue Ridge to recover space for its core utility service." *See* Martin Test., Vol. 4, p. 101. Further, such "recovery of space" provisions are industry standard. Blue Ridge's witness, Mr. Arnett, testified at hearing that, of the hundreds of pole attachment agreements he has review, he has never seen a third-party pole attachment agreement that did not include a recovery of space provision.

66. Accordingly, Commission concludes that Blue Ridge's proposed terms regarding "recovery of space," as set forth in Article 15 of the 2003 and 2008 Agreements, is just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties.

* * *

67. Based on a careful review of the parties' proposed contract terms, the Commission finds that each of Blue Ridge's proposed terms and conditions set forth above is just, reasonable, and consistent with the public interest and, therefore, is approved for use in any new pole attachment agreement by and between Blue Ridge and Charter.

D. Charter's Counterclaim for "True Up" Payments

68. In addition to seeking the FCC Cable Rate, Charter has asserted a counterclaim for "true up" payments, retroactively applying whatever rate the Commission adopts back to August 25, 2015—which Charter incorrectly asserts is 91 days after Blue Ridge initiated negotiations for a new pole attachment agreement. Charter's rests its counterclaim, however, on a misreading of Section 62-350, which does not authorize the Commission to apply rates retroactively when the parties are operating under an existing agreement, as they are here.

69. As set forth above, Charter has (i) stipulated that it continues to attach to Blue Ridge's poles pursuant to the parties' 2008 Agreement, *see* Joint Stipulations, ¶ 6, filed on November 02, 2018, and (ii) continued to pay pole attachment fees to Blue Ridge under that agreement without protest. Thus, it is undisputed that Charter and Blue Ridge are parties to an *existing agreement*.

70. Because Charter and Blue Ridge are parties to an existing agreement, Section 62-350 requires that the Commission apply any rate it adopts only *prospectively*, not retroactively as Charter claims. Section 62-350 requires that communications attachers and cooperatives must either negotiate for a period of 90 days or reach an impasse before submitting a pole attachment dispute to the Commission. *See* N.C.G.S. § 62-350(c). There are two ways to trigger this 90-day negotiation period under the statute: (1) "[f]ollowing receipt of a request from a communications service provider" or (2) "[f]ollowing a request from a party to an existing agreement," (that is, a request from either party), provided the request is

“made pursuant to the terms of the agreement or made within 120 days prior to or following the end of the term of the agreement.” *See* N.C.G.S. §§ 62-350(b).

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

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

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

71. In addition to stipulating that it continues to attach to Blue Ridge’s poles “pursuant to” the 2008 Agreement, *see* Joint Stipulations, ¶ 6, the evidence makes clear that Charter has agreed through its conduct to continue operating under the 2008 Agreement, even after the expiration of its original term. Unless the statute of frauds applies, parties are free to contract orally, and the terms of that contract may be oral, written, or both. *See Bishop v. Du Bose*, 252 N.C. 158, 163, 113 S.E.2d 309, 314 (1960) (“[P]arties may, at their option, put their agreement in writing or may contract orally, or put some of the terms in writing and arrange others orally.”) Moreover, a party who performs under the terms of a written contract, and accepts its benefits, is bound by the agreement’s terms, even if the party did not sign the document itself. *See Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822–23, 561 S.E.2d 578, 582 (2002) (finding an enforceable agreement despite the defendants’ failure to sign it

because the defendants accepted consideration from the plaintiffs and acted pursuant to the terms of the agreement;, noting that “[t]here was never any indication during that process that the parties were not operating [pursuant to the terms of the agreement]”); *W.B. Coppersmith & Sons, Inc. v . Aetna Ins. Co.*, 222 N.C. 14, 21 S.E.2d 838 (1942) (“[A] signature is not always essential to the binding force of an agreement . . . and . . . in the absence of a statute it need not be signed, provided it is accepted and acted on, or is delivered and acted on.”). Here, as set forth above, Charter has continued to pay pole attachment fees to Blue Ridge after the original term of the 2008 Agreement, without objection or protest. Indeed, Charter alleges in its counterclaim that it “accepted,” and continued to pay, these attachment fees to Blue Ridge. *See* Answer and Counterclaims, ¶ 27. Charter’s witnesses, including Mr. Mullins have likewise asserted at hearing that Charter continues to operate under the 2008 Agreement, which they refer to as the “current agreement.” Thus, independent of its stipulation, Charter’s conduct shows it has agreed to continue under the 2008 Agreement by continuing to pay fees and maintain and make new attachments to Blue Ridge’s poles pursuant to the terms of that agreement.

72. Because Charter is operating under an existing pole attachment agreement with Blue Ridge, it is not entitled to recover retroactive “true up” payments based on the rate the Commission ultimately adopts. Instead, pursuant to Section 62-350 the rate the Commission adopts will only apply prospectively from the date of this order. Charter’s counterclaim for “true up” payments retroactively applying the rate the Commission adopts back to 2015 therefore should be denied.

73. In addition to its counterclaim asking the Commission to apply the rate it adopts retroactively back to 2015 in the form of “true up” payments, Ms. Kravtin also asserts in her written, pre-filed testimony that the Commission should assess an additional amount against Blue Ridge, based on the claim that Blue Ridge billed Charter on a per-attachment basis, rather than per-pole as set forth in the 2008 Agreement. To extent Charter asserts a counterclaim based on allegations that it should have been charged on a per-pole, versus a per-attachment, basis, the claim is not properly before the Commission. Section 62-350, requires that, in submitting disputes to the Commission, “[t]he parties shall identify with specificity in their respective filings the issues in dispute.” N.C.G.S. § 62-350(c). Charter did not identify any claim for the difference between billings on a per-pole versus per-attachment basis in its pleadings in this matter, but instead chose only to raise it through the pre-filed testimony of its expert witness, Ms. Kravtin, after fact discovery had already closed. Accordingly, to the extent Charter asserts a counterclaim for alleged overcharges as a result of being billed on a per-attachment, versus a per-pole, basis that claim should be denied.

* * *

Based on the foregoing, IT IS, THEREFORE, ORDERED, as follows:

1. The TVA Rate formula is hereby deemed a just and reasonable methodology for deriving an annual pole attachment rate for Charter’s attachments to Blue Ridge’s distribution poles, and Charter shall pay the rate derived from this

formula for its attachments to Blue Ridge's poles as part of any new pole attachment agreement between the parties;

2. [In the alternative, if the Commission adopts the FCC Cable Rate: Charter shall pay Blue Ridge a pole attachment rate for attachments to Blue Ridge's distribution poles calculated using the FCC Cable Rate and applying Blue Ridge's actual data, as set forth above.]
3. [In the alternative, if the Commission adopts the FCC Cable Rate: Charter shall pay Blue Ridge a pole attachment rate for attachments to Blue Ridge's distribution poles calculated using the FCC Cable Rate and applying Blue Ridge's actual data, modified to allocate the Communications Worker Safety Zone equally among all attachers, as set forth above.]
4. Blue Ridge's proposed contract terms and conditions are approved as just and reasonable, and Blue Ridge may include these proposed terms in any pole attachment agreement between Blue Ridge and Charter;
5. Charter's counterclaims seeking "true up" payments or otherwise seeking to recover alleged overcharges from Blue Ridge are denied.
6. The costs of this proceeding, in the amount of \$10,000.00, shall be assessed against Charter pursuant to N.C.G.S. § 62-350(h).

ISSUED BY ORDER OF THE COMMISSION

This the ____ day of _____ 2018.

NORTH CAROLINA UTILITIES
COMMISSION

Martha Lynn Jarvis, Clerk

OFFICIAL COPY

Apr 04 2018

CERTIFICATE OF SERVICE

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

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

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

This 4th day of April, 2018.

/s/ Debbie W. Harden
Debbie W. Harden