

LAW OFFICE OF CHARLOTTE MITCHELL

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November 30, 2016

Paige Morris  
Deputy Clerk  
North Carolina Utilities Commission  
430 N. Salisbury Street  
Raleigh, NC 27603 – 5918

**Re: Verified Petition for Relief**  
**NCUC Docket No. EC-23, Sub 50**

Dear Ms. Morris:

Enclosed herewith, please find the Verified Petition for Relief by Blue Ridge Electric Membership Corporation (“BREMC”) for filing on behalf of BREMC in the above-referenced docket. Should you have any questions or comments, please do not hesitate to call me. Thank you in advance for your assistance and cooperation.

Regards,

/s Charlotte Mitchell

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

against

Charter Communications  
Properties LLC,  
Respondent.

VERIFIED PETITION FOR RELIEF BY  
BLUE RIDGE ELECTRIC  
MEMBERSHIP CORPORATION

NOW COMES Blue Ridge Electric Membership Corporation (“BREMC”), by and through undersigned counsel and pursuant to Section 62-350 of the North Carolina General Statutes, and submits this verified petition (the “Petition”) to the North Carolina Utilities Commission (the “Commission”) to initiate a proceeding for resolution by the Commissions of certain issues in dispute between BREMC and Charter Communications Properties LLC (“Charter”). In support of this Petition, BREMC respectfully shows the Commission the following:

**PARTIES**

1. Blue Ridge Electric Membership Corporation is a member-owned cooperative, formed pursuant to Article 2, Chapter 117 of the North Carolina General Statutes, whose mission is to benefit its member-owners by providing reliable electric and energy services, delivered safely and efficiently. BREMC serves approximately 73,700

consumers in Caldwell, Watauga, Ashe, and Alleghany counties and parts of Wilkes, Alexander and Avery counties in North Carolina. BREMC's principal place of business is located at 1216 Blowing Rock Boulevard, NE, Lenoir, North Carolina 28645.

2. BREMC's counsel in this proceeding, to whom all notices, pleadings and other documents related to this proceeding should be directed, are:

Charlotte A. Mitchell  
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3. Charter Communications Properties LLC is a Delaware limited liability company certified to transact business in North Carolina, with a principal place of business located at 12405 Powers Court Drive, St. Louis, Missouri 63131. Charter provides cable telecommunications service in North Carolina and uses the utility poles, ducts and conduits owned and controlled by BREMC to provide such service.

## BACKGROUND

4. In 1978, with the addition of Section 224 to the Communications Act of 1934 (the "Federal Act"), Congress directed the Federal Communications Commission ("FCC") to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable. Pole Attachment Act of 1978, Pub. L. No. 95-

234, 92 Stat. 33 (1978). The definition of pole attachment in the Federal Act was later amended by the Telecommunications Act of 1996 to include attachments by providers of telecommunications service and granted both cable systems and telecommunications service providers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a “utility.” 47 U.S.C. § 224(f).

5. Notably, Section 224 of the Federal Act excludes from the definition of utility “any person who is cooperatively organized,” thus exempting member-owned cooperatives from regulation by the FCC on the issue of pole attachments. 47 U.S.C. § 224(a)(1).

6. As member-owned cooperatives are exempted from regulation by the FCC on the issue of pole attachments, North Carolina law—not federal law—governs the attachment by cable systems and telecommunications service providers to the poles of North Carolina’s member-owned cooperatives. See N.C. Gen. Stat. § 62-350 et seq.

7. Under North Carolina law, a member-owned cooperative must “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. Gen. Stat. § 62-350(a). If the member-owned cooperative and the communications service provider cannot reach an agreement on such rates, terms and conditions, then the statute authorizes the Commission to adjudicate disputes arising between the parties. N.C. Gen. Stat. § 62-350(c).

8. BREMC, a member-owned cooperative, and Charter, a communications service provider, have a long history of working cooperatively to facilitate Charter’s provision of communications service to customers located within BREMC’s service

territory through Charter's use of BREMC's poles. The parties first entered into a contract to facilitate Charter's provision of such service in 2003. Over the course of the contractual relationship between the BREMC and Charter, the parties have collaborated in good faith to provide their respective services over poles provided by BREMC without compromising BREMC's obligation to provide safe and reliable electric service to its members.

9. In May 2015, BREMC initiated with Charter the negotiation of a new pole attachment license agreement. While the parties have had some success in negotiating terms and conditions of the proposed new agreement, the issues discussed herein remain unresolved in spite of the parties' efforts.

10. In light of the fact that the parties have reached an impasse on these issues, in accordance with Section 62-350(c) of the North Carolina General Statutes, BREMC hereby initiates this proceeding before the Commission for an adjudication of key disputed issues to enable the parties to resume negotiations and enter into a new agreement.

## **ISSUES IN DISPUTE**

### **11. Terms and Conditions of New Pole Attachment License Agreement**

Although BREMC and Charter have made progress in preliminary negotiations of terms and conditions of the new agreement, parties have been unable to resolve several issues. BREMC hereby seeks guidance from the Commission on the unresolved issues so that the parties may resume negotiations and reach a final agreement. In general, while BREMC recognizes Charter's statutory right to utilize its poles at just, reasonable and

non-discriminatory rates, terms and conditions, BREMC's primary obligation is to provide safe and reliable electric service—an essential service—to its member-owners. Thus, Charter's right to use BREMC's poles must be balanced against BREMC's obligation to provide safe and reliable electric service to its member-owners. BREMC cannot incur additional costs and subordinate the provision of safe and reliable electric service simply to facilitate the provision of Charter's, or any other non-essential telecommunications service. To date, BREMC and Charter have failed to resolve the following issues:

- a. Disputed Invoices.** The parties generally agree that Charter may dispute any invoice from BREMC at any time during the term of the new agreement. However, the parties disagree as to Charter's obligation pending resolution of the dispute. It is BREMC's position that Charter must pay all amounts, whether disputed by Charter, pending resolution while Charter takes the position that it should pay only the undisputed amounts pending resolution. Charter's position creates an incentive for Charter to dispute any amount owed to BREMC and to work less than efficiently to resolve disputes, shifting all financial risk of a dispute to BREMC.
- b. Permit Application and Fee.** The parties generally agree that Charter's attachments to BREMC's poles should continue to be permitted, that BREMC will review the permit applications to determine if modifications are necessary to accommodate Charter's new attachments, and that BREMC will conduct the work necessary to accommodate the new

attachment in accordance with engineering plans agreed upon by the parties. Additionally, the parties generally agree that it is appropriate to charge a fee for each permit application. However, the parties disagree as to when a permit application must be submitted. It is BREMC's position that a permit application be submitted for each pole to which Charter seeks to attach and an appropriate fee charged. It is Charter's position that a single permit application should be submitted only for projects involving more than ten (10) poles. Charter's position ignores the administrative and technical work required to process permit applications and creates an incentive for Charter to propose multiple small projects that involve fewer than ten (10) poles to avoid the permitting process.

- c. **Certification of Pole Attachment.** The parties agree that Charter, at Charter's expense, must provide confirmation to BREMC that a pole attachment: i) is of sound engineering design and fully complies with any specifications and standards set forth in the agreement as well as with the National Electrical Safety Code ("NESC"); and ii) is constructed in accordance with the engineering plans agreed upon by the parties. The parties however disagree from whom the certification should come. It is BREMC's position that the certification must be made by a duly licensed professional engineer ("PE"); while Charter maintains that certification by a PE is unnecessary. In addition, the parties also disagree as to whether certification must be provided for all pole attachments. It is BREMC's position that certification must be given for all attachments, while Charter

deems certification for attachments on secondary poles to be unnecessary. BREMC's positions are grounded in prudent electric utility practice, as well as in BREMC's obligation to ensure the safety and integrity of its critical infrastructure.

- d. Maintenance and Transfers.** With respect to the replacement of poles, the parties agree that BREMC will replace, at BREMC's expense, any pole that has become unserviceable when BREMC determines that the pole in question is unserviceable for its intended purpose. The parties disagree as to whom should bear the costs associated with a pole replacement that is necessitated by the presence of a Charter attachment on the pole. It is BREMC's position that Charter should bear all cost associated with pole replacement necessitated by Charter, under the principle of cost causation. It is Charter's position that BREMC should bear these costs. With respect to the transfer of any existing attachment necessitated by the need to replace or relocate a pole, the parties agree that the permit for the attachment transfers to the new pole. The parties also agree that Charter is responsible for the cost associated with the transfer. The parties disagree as to the consequences of Charter's failure to make a timely transfer of the attachment. It is BREMC's position that if Charter does not timely complete the transfer, Charter becomes subject to the fees associated with unauthorized attachments. BREMC's position is based on the facts that the failure to make a timely transfer results in: i) an unnecessary, and often deteriorated pole being left in place, and



consequently creating a safety hazard; ii) the burden of tracking the existence of the idle pole structure until it can be removed; iii) a return trip to remove the old pole by BREMC, and iv) undue burden, and potential risk, to the owner of the property on which the poles are located. While Charter does not appear to dispute that it must bear the cost associated with a transfer, it refuses to be obligated to complete the transfer by a time certain and to be subject to any fees in the event of untimely transfer.

- e. **Non-Compliant Attachments.** The parties agree that in the event of a non-compliant pole attachment, Charter must develop a plan for corrective action. The parties disagree as to: i) when Charter is responsible for the cost associated with corrective action; ii) whether the corrective action must be completed by a time certain; and iii) whether any penalty provisions should apply to Charter if corrective action is not timely implemented. It is BREMC's position that: i) a correction plan must be submitted by Charter by a time certain; ii) corrective action must be taken by time certain, and iii) Charter is responsible for the cost of any necessary corrective action on its non-compliant pole attachment unless Charter can demonstrate that it did not cause non-compliance. Finally, in the interest of safety and reliability, it is BREMC's position that if Charter fails to implement timely corrective action, BREMC has right to revoke the permit and apply penalty provisions associated with unauthorized attachment. Charter would shift the risk of non-compliance almost entirely to BREMC, by maintaining that it should not be responsible for

cost of corrective action if it did not cause non-compliance and that BREMC should not have the right to revoke permit and declare the pole attachment as unauthorized if Charter fails to implement corrective action.

- f. Insurance.** The parties agree that Charter should be obligated to maintain minimum insurance coverage during the term of the agreement, however the parties disagree as to the extent of the coverage. Charter takes the position that Charter's risk management requirements should control. It is BREMC's position that Charter must provide the minimum insurance coverage required by the Rural Utilities Service ("RUS"). The RUS is the agency within the United States Department of Agriculture, Rural Development that administers programs to provide much-needed infrastructure or infrastructure improvements to rural communities. The RUS provides loans and loan guarantees to electric cooperatives to finance the construction or improvement of electric distribution, transmission and generation facilities in rural areas. The RUS has provided loans to BREMC to finance the construction of its infrastructure, including poles, and the financing arrangements obligate BREMC to provide certain insurance coverage. Therefore, as the RUS has financed BREMC's infrastructure to which Charter seeks to attach and obligates BREMC to provide certain insurance coverage, Charter should be obligated to provide the coverage required by RUS, as well.
- g. Rights and Obligations in the Event of Default.** The parties agree that the new agreement must establish rights and obligations in the event of a

default by Charter. It is BREMC's position that if Charter fails to pay any fee or other amount owed under the agreement and the failure continues for 10 days after notice to Charter, then an event of default has occurred. Further, in the event of default, BREMC may: i) terminate the agreement; ii) terminate the permit; iii) refuse to issue additional permits; iv) stop make ready construction work; or v) perform, at Charter's expense, any work that Charter failed to perform. Charter would limit an event of default to Charter's failure to pay any undisputed amount owed under the agreement and would limit BREMC's rights to: i) terminate the agreement; ii) terminate the permit; or iii) perform any work that Charter failed to perform. Again, Charter would shift the risk of default to BREMC and would create an incentive to dispute any amount owed.

- h. Right to Withhold Consent.** The parties agree that it would be reasonable for BREMC to withhold any consent required by the new agreement in the event that Charter is in default under the agreement or is more than thirty (30) days past due in any amounts owed to BREMC. However, Charter would deny BREMC this right to withhold consent in the context of granting access to new/additional poles, which effectively abrogates any leverage this provision creates for BREMC when Charter is in default.
- i. Confidentiality.** There is a fundamental disagreement between the parties as to whether the new agreement and terms and conditions thereof are confidential. Charter takes the position that any agreement between the

parties is governed by law and, therefore, cannot be confidential. While BREMC does not refute the fact that North Carolina law grants Charter the right to access BREMC's poles, the agreement that governs this access involves market sensitive information and is necessarily the result of compromise and the give and take of the parties.

## **12. Methodology For Calculating Pole Attachment Fee**

In addition to the foregoing essential terms and conditions, BREMC and Charter have been unable to agree on the appropriate method for calculating the annual attachment fee to be paid by Charter to BREMC for each attachment to BREMC's poles. Numerous methodologies exist by which the rate to be charged for the pole attachment may be calculated, which fully allocate the costs of pole ownership fairly to the pole owner and attaching parties and the most reasonable of which take into account the additional costs imposed by pole attachments as well as benefits enjoyed as a result of pole attachments.

On February 11, 2016, the Board of Directors of the Tennessee Valley Authority ("TVA") adopted a methodology for calculating rates that the local power companies ("LPCs") that distribute power for the TVA (the "TVA Method") shall charge for attachments to distribution poles. See Determination on Regulation of Pole Attachments, available at [https://www.tva.gov/file\\_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva\\_determination\\_on\\_regulation\\_of\\_pole\\_attachments.pdf](https://www.tva.gov/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva_determination_on_regulation_of_pole_attachments.pdf), attached hereto as Exhibit 2. The TVA Method was developed by TVA regulatory staff, in conjunction with LPCs and the Tennessee Valley Public Power Association, after an in-

depth review of the methodologies used by other regulatory bodies, with a focus on avoiding the subsidization of non-electric activities by electric system assets and retail ratepayers. Specifically, the method reflects the TVA Board of Directors' responsibility "to ensure that electric systems are being appropriately compensated for the use of electric system assets" as the failure to do so would have a "direct impact on retail rates charged by LPCs because electric ratepayers will be forced to subsidize the business activities of those entities attaching to the assets of LPCs for non-electric purposes." Exhibit 2, pp 2-3. At present, upon information and belief, the TVA Method is applicable to more than 160 electric cooperatives and municipal power providers located in five states across the Southeastern United States.

It is BREMC's position that the TVA Method is consistent with the public interest and necessity and is the appropriate methodology to be used in calculating the pole attachment fee to be paid by Charter as: i) the TVA Method was developed by TVA regulatory staff after an in-depth review of various methodologies used by other regulatory bodies; ii) the TVA Method was reviewed and adopted by the TVA Board upon a determination that the methodology was appropriate for the LPCs and ensures fair compensation for the use of electric system assets; and iii) the TVA LPCs, which consist of municipal utilities and electric cooperatives, have similar operating systems and cost structures as BREMC.

In light of the foregoing, BREMC requests that the Commission adjudicate the issue of the methodology to be used to calculate the rate and, in doing so, allow BREMC the opportunity to present evidence that will establish that the TVA Method is consistent

with the public interest and necessity and is the appropriate methodology to be used in calculating the pole attachment fee to be paid by Charter to BREMC.

### **RELIEF REQUESTED**

WHEREFORE, BREMC respectfully requests that the Commission:

1. Adjudicate reasonable terms and conditions of a new pole attachment license agreement between Charter and BREMC, consistent with BREMC's positions set forth herein;
2. Adjudicate the appropriate methodology to be used in calculating the pole attachment fee to be paid by Charter to BREMC, consistent with BREMC's position set forth herein;
3. Adjudicate any additional disputed issues that may arise during the negotiation of a new pole attachment license agreement; and
4. Award such other relief as the Commission deems just and proper.

Respectfully submitted this the 30<sup>th</sup> day of November, 2016.

/s Charlotte A. Mitchell  
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ATTORNEYS FOR BLUE RIDGE ELECTRIC  
MEMBERSHIP CORPORATION

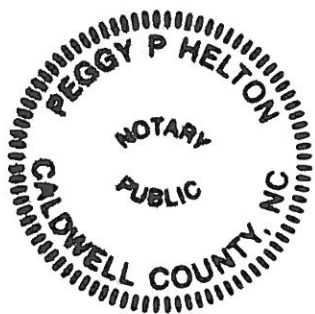
STATE OF NORTH CAROLINA

CALDWELL COUNTY

VERIFICATION

The undersigned, being first duly sworn, deposes and says that he is Lee Layton Senior Vice President and Executive Consultant of Blue Ridge Electric Membership Corporation. He further states that he has read the foregoing petition, and that, to his personal knowledge and belief, the matters and statements contained therein are true, except as to those matters or statements made upon information and belief, and as to those, he believes them to be true; and that he verifies the attached petition on behalf of Blue Ridge Electric Membership Corporation.

This the 28<sup>th</sup> day of November, 2016.



A handwritten signature of Lee Layton in cursive script, written over a horizontal line.

Lee Layton

Sworn to and subscribed before me  
this 28<sup>th</sup> day of November, 2016.

A handwritten signature of Peggy P. Helton in cursive script, written over a horizontal line.  
Notary Public (Peggy P. Helton)

My Commission Expires: 08-16-2019



**CERTIFICATE OF SERVICE**

The undersigned certifies that she has served a copy of the foregoing **VERIFIED PETITION OF BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION** upon the parties of record in this proceeding, or their attorneys, by electronic mail as follows:

Charter Communications Properties LLC  
Legal Department – Operations  
12405 Powerscourt Drive  
St. Louis, MO 63131

Ronnie McWhorter  
Dir, Field Engineering  
2 Digital Place, 2nd Floor  
Simpsonville, SC 29681

This 30<sup>th</sup> day of November, 2016.

/s Charlotte A. Mitchell