

**BEFORE THE STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

TIME WARNER CABLE SOUTHEAST)
LLC)
Complainant,)
v.)
JONES-ON SLOW ELECTRIC)
MEMBERSHIP CORPORATION,)
Respondent.)

DOCKET NO. EC-43, SUB 88

DIRECT TESTIMONY

OF

NESTOR MARTIN

Submitted on Behalf of

Time Warner Cable Southeast LLC

May 30, 2017

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1 **I. INTRODUCTION AND SUMMARY**

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

3 A. My name is Nestor M. Martin. My business address is 7910 Crescent Executive
4 Drive, 5th Floor, Charlotte, North Carolina 28217. I am the Senior Director of
5 Construction, Carolina Region, for Time Warner Cable Southeast LLC (“TWC”).

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

7 A. My testimony is offered on behalf of TWC.

8 **Q. What business is TWC engaged in?**

9 A. TWC operates cable systems in Alabama, North Carolina, South Carolina, and
10 Virginia. TWC provides video, broadband, and digital phone services to
11 commercial and residential customers.

12 **Q. Please describe your professional experience and current role at TWC.**

13 A. I have worked in the cable industry for nearly 40 years. I have been employed by
14 TWC for 11 years. I have held various positions with TWC, including Senior
15 Director of Engineering Implementation, Senior Director of Construction for the
16 East Region, and Senior Director of Construction for the Carolinas. I have
17 responsibilities for planning, budgeting and directing of outside plant construction
18 operations.

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

21 A. No. But I have testified in open court in two trials conducted before the North
22 Carolina Business Court related to pole attachment rates under North Carolina
23 General Statute § 62-350.¹

¹ See *Time Warner Entertainment – Advance/Newhouse P’ship vs. Town of Landis*, No.10 CVS 1172, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014, and *Rutherford Elec. Membership Corp. v. Time Warner*

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

2 A. I am submitting testimony in this proceeding to provide background about TWC's
3 network construction and to address a number of pole attachment rates, terms, and
4 conditions that are in dispute in this and related proceedings.

5 **Q. Please summarize your testimony.**

6 A. My testimony addresses why and how TWC uses space on Jones-Onslow's poles
7 to make attachments necessary to provide its communications services in the
8 Cooperative's service area. Due to economic, aesthetic, legal, regulatory, and
9 other factors, TWC often has no practical alternative to using Jones-Onslow's
10 poles to build its cable system. Jones-Onslow licenses TWC to use "surplus"
11 space on its poles—i.e., space that is not otherwise used by the Cooperative or the
12 incumbent telephone company ("ILEC"). In almost all cases, TWC uses only one
13 foot of space to make its attachments, compared to two feet used by the telephone
14 company and eight-and-a-half feet or more used by the Cooperative for its electric
15 facilities. The Cooperative also uses the space mandated by the National
16 Electrical Safety Code ("NESC") between its electric conductors and TWC's
17 cable attachments (referred to as the "safety space") to attach streetlights, traffic
18 signaling equipment, and other facilities that generate additional revenue for it.
19 Where there is not enough space on a pole to accommodate TWC's attachment,
20 TWC pays to create more space, either by paying to rearrange the existing
21 facilities or to install a larger or stronger pole. Even when TWC pays for a larger
22 pole, Jones-Onslow continues to own the pole, and TWC still pays an annual

Entertainment – Advance/Newhouse P'ship, No. 13-CVS-231, 2014 WL 2159382 (N.C. Super. Ct. May 22, 2014), *aff'd* 771 S.E.2d 768 (N.C. Ct. App. 2015).

1 attachment fee to attach to it. TWC does not dispute these aspects of the parties'
2 relationship. And TWC is willing to pay an annual pole attachment rate that
3 compensates the utility for TWC's fair share of the utility's costs of owning and
4 maintaining poles. Given the minimal amount of surplus space TWC uses on
5 Jones-Onslow poles, and the economic principles described by TWC's expert
6 witness Patricia Kravtin, TWC believes its fair share is best represented by an
7 allocation of those costs based on the proportion actually used by TWC of the
8 space on the pole than can be used to suspend wires and cables above the streets.
9 This approach is consistent with the pole rates TWC pays to investor-owned
10 utilities ("IOUs") and ILECs, whose poles are distributed around and throughout
11 the service territory served by Jones-Onslow and are functionally identical to the
12 Cooperative's poles.

13 **II. TWC'S ATTACHMENTS TO JONES-ONSLow'S POLES**

14 **Q. Can you describe TWC's cable systems in North Carolina?**

15 A. TWC constructs, operates, and maintains hybrid fiber-coaxial cable systems in
16 North Carolina, including in areas where Jones-Onslow provides electric service.
17 TWC's communications facilities are installed overhead and underground.

18 **Q. Does TWC attach overhead facilities to utility poles owned by Jones-Onslow?**

19 A. Yes. TWC attaches to the Cooperative's poles pursuant to the parties' pole
20 attachment agreement, attached as Exhibit 1 ("2007 Agreement"). TWC and the
21 Cooperative executed the 2007 Agreement prior to the enactment of N.C.G.S.
22 § 62-350, at a time when neither federal nor state law regulated the rates, terms,
23 and conditions the Cooperative could require of TWC for making attachments to

1 the Cooperative's poles. In 2017, Jones-Onslow invoiced TWC for attachments
2 to 12,342 poles in the areas of Onslow and Jones counties in North Carolina.

3 **Q. Did there come a time when TWC terminated the 2007 Agreement?**

4 A: On December 14, 2011, legal counsel for TWC sent a letter to Jones-Onslow to
5 terminate the parties' 2007 Pole Attachment License Agreement. Referencing
6 Section 62-350, the letter formally requested to negotiate rates, terms, and
7 conditions of a new pole attachment agreement. *See* Ex. 2.

8 **Q. Have the parties tried negotiating a new pole agreement?**

9 A. Yes, but we have reached an impasse. Initially, the parties were largely content to
10 wait for TWC's negotiations with the North Carolina Association of Electric
11 Cooperatives ("NCAEC") to develop a new template pole attachment agreement
12 and rate methodology. Since TWC terminated the agreement and invoked its
13 statutory rights, however, Jones-Onslow consistently increased its pole attachment
14 rate, and repeatedly refused to provide TWC with sufficient cost information to
15 justify its rates *See* Ex. 3. In response to another rate increase in 2013, TWC
16 proposed an interim rate, pending the NCAEC negotiations and resolution of the
17 appeal of a rate case TWC was involved in with the City of Landis before the
18 North Carolina Business Court. Ex. 4. In response, Jones-Onslow sent a letter to
19 our Construction Coordinator prohibiting any new TWC attachments to any of
20 Jones-Onslow's poles until the parties entered into a new agreement. Ex. 5. As a
21 result, TWC was unable to connect new customers in the area. Jones-Onslow
22 then threatened to treat all of our existing attachments as unauthorized, refused to
23 allow maintenance work on our facilities attached to its poles, and even
24 threatened to disconnect the electric service necessary to operate our system,

1 unless TWC paid Jones-Onslow's new rate in full. Ex. 6. In order to avoid
2 disruption to our service we paid the excessive rate under protest, and the parties
3 entered an interim agreement in June 2013 that would enable the parties to
4 continue operating under the terms of the 2007 Agreement until they signed a new
5 agreement. Ex. 7. Even after entering the interim agreement, Jones-Onslow
6 ignored our requests for cost information to support its excessive rates. Exs. 8 &
7 9.

8 **Q. Did TWC ever propose a new pole attachment agreement to Jones-Onslow?**

9 A. TWC sent Jones-Onslow a draft pole attachment agreement in December 2014,
10 attached as Exhibit 10. Jones-Onslow generally expressed a willingness to
11 discuss the new agreement further and its hope that the parties could reach a
12 mutually satisfactory pole attachment agreement. See Ex. 11. But Jones-Onslow
13 never offered a redlined version of TWC's draft nor did it propose a draft of its
14 own.

15 **Q. Why does TWC attach to Jones-Onslow's utility poles?**

16 A. TWC attaches its fiber optic and coaxial cable wires to Jones-Onslow's poles in
17 order to provide its competitive communications services to subscribers within
18 Jones-Onslow's service area. TWC is reliant on access to Jones-Onslow's poles
19 to provide its services. Building cable facilities underground is significantly more
20 expensive than aerial construction, and often infeasible, particularly where TWC
21 already owns existing aerial infrastructure. TWC has built facilities underground
22 in new subdivisions where all utilities are required to be underground and where
23 there is no aerial infrastructure, but has long depended on attaching to existing
24 poles for most of its distribution plant.

1 **Q. Where on Jones-Onslow's poles does TWC make its attachments?**

2 A. TWC uses one foot of excess or surplus space on a pole, roughly 21 feet from
3 "grade" (or ground level). TWC only uses space on the pole that is not otherwise
4 used by the Cooperative or another joint user, like CenturyLink, the incumbent
5 telephone company, and where it can make its attachment in compliance with the
6 NESC.

7 **Q. What happens if there is not any surplus space on the pole, or there is not**
8 **enough space to accommodate TWC's attachment?**

9 A. TWC must pay to create space to accommodate its attachment or its attachment is
10 not permitted. This could mean paying to rearrange the existing facilities on the
11 pole. Or it could require TWC to pay for a taller or stronger pole, including all of
12 the work to install the pole and transfer the existing facilities to it.

13 **Q. Does that mean TWC owns the new pole?**

14 A. No. Although TWC pays to replace a pole with a taller pole if necessary to safely
15 accommodate its attachments, the pole will still belong to the Cooperative. And,
16 even though TWC bought the pole, TWC still pays an annual attachment fee for
17 its attachment to the pole.

18 **Q. Are these obligations in dispute?**

19 A. No. TWC remains willing to accept similar requirements in a new pole
20 attachment agreement.

21 **Q. What happens if Jones-Onslow needs space on a pole to which TWC is attached?**

22 A. Under Article 14 of the parties' 2007 Agreement, Exhibit 1, if TWC is already
23 occupying the pole and Jones-Onslow determines it needs additional space for its
24 electric service, we are required to rearrange our facilities to accommodate the

1 change at our own expense within a time period prescribed by the Cooperative.

2 But under the 2007 agreement, Jones-Onslow will have to pay to replace the pole
3 if a taller or stronger pole is necessary for its own business needs.

4 **Q. Please describe the typical configuration of attachments on a Jones-Onslow**
5 **pole?**

6 A. Jones-Onslow places its electric facilities at the top of the utility pole. I
7 understand the Cooperative reserves eight-and-a-half feet of space for its
8 facilities. See Ex. 12 at Art. 1.A. Going down the pole, TWC's facilities are
9 typically next, separated from the Cooperative's neutral wire by a 40 inch "safety
10 space." Our facilities do not use a lot of space, usually only about an inch where
11 a bolt runs through the pole to hold a bracket supporting our stainless steel strand.
12 But the 2007 Agreement allocates TWC one foot of space. The telephone
13 company's attachments are typically the lowest on the pole, where they can easily
14 be accessed for repairs and maintenance. CenturyLink reserves two feet of space
15 for its attachments, often using one foot of space to attach its large and heavy
16 copper bundles and the second foot for its fiber optic and other communications
17 wires. *Id.* Below the telephone company's attachments is about 18 feet of space
18 to the ground, which is required to maintain clearances. This space required to
19 maintain "minimum grade" is not usable for aerial attachments. Finally, a portion
20 of the pole is buried underground. The standard rule of thumb is to bury a pole at
21 a depth of 10% of its height, plus two feet. So, a 40 foot pole would be buried six
22 feet deep.

1 **Q. What is the safety space on a pole?**

2 A. Safety space is the term used to refer to the minimum required separation between
3 electrical conductors and communications facilities. It is designed to ensure the
4 safety of both the communications company's and the utility's workers by
5 allowing sufficient space between the facilities that a person can work on the
6 electric or communications facilities without touching the other.

7 **Q. Is the safety space usable?**

8 A. Yes. Jones-Onslow uses this space to attach streetlights, flood lights, traffic
9 control equipment, and other facilities. The Cooperative also may use the space
10 for its own communications wires, as Jones-Onslow has contemplated doing. See
11 Ex. 13, Excerpts from Transcript of Corporate Deposition of T. Pritchard
12 ("Pritchard Depo.") at 24:6-25. The NESC allows these other uses because they
13 do not pose a danger to workers on the pole. Jones-Onslow receives revenue
14 from its use of this space. *Id.* at 30:3-31:19; 34:5-25.

15 **Q. For how many poles has the Cooperative invoiced TWC each year since 2012?**

16 A. TWC was invoiced by Jones-Onslow, and paid for, attachments on the following
17 number of poles for each year since 2012:

- 18 • In 2012, 8,306 poles.
- 19 • In 2013, 8,616 poles.
- 20 • In 2014, 8,717 poles.
- 21 • In 2015, 8,749 poles.
- 22 • In 2016, 12,564 poles.
- 23 • In 2017, 12,342 poles.

1 **Q. What was the cause of the jump in the number of poles billed between 2015 and**
2 **2016?**

3 A. Jones-Onslow increased the pole count based on its findings in an inventory it
4 conducted in 2015. As stated in the testimony filed by Thomas Jacobs, the
5 Cooperative did not provide advance notice or give TWC a chance to participate
6 in the inventory. TWC has paid for the higher number of poles under protest.
7 Jones-Onslow also has demanded exorbitant penalties and fees based on its
8 inventory, despite having no contractual right to those penalties, discussed in
9 more detail below. I believe Jones-Onslow conducted the inventory and
10 demanded the exorbitant penalties as a means of exerting leverage in the ongoing
11 negotiations for a new pole agreement.

12 **Q. What has the Cooperative charged for TWC's attachments, and what has TWC**
13 **paid since 2012?**

14 A. TWC has paid the pole attachment charges at the rate specified in Jones-Onslow's
15 invoices. But, since sending the termination letter in 2012, TWC has made its
16 payments under protest and subject to true up to a rate determined in this
17 proceeding. Specifically, TWC has made the following payments each year from
18 2012 through 2017:

- 19 • In 2012, TWC paid \$166,542.24 at a rate of \$20.04 per pole.
- 20 • In 2013, TWC paid \$175,938.72 at a rate of \$20.42 per pole.
- 21 • In 2014, TWC paid \$179,918.88 at a rate of \$20.64 per pole.
- 22 • In 2015, TWC paid \$182,941.59 at a rate of \$20.91 per pole.
- 23 • In 2016, TWC paid \$262,964.52 at a rate of \$20.93 per pole.
- 24 • In 2017, TWC paid \$261,403.56 at a rate of \$21.18 per pole.

1 **III. TWC’S ATTACHMENTS TO UTILITY POLES**
2 **THROUGHOUT NORTH CAROLINA**

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

4 A. Yes. TWC has arrangements with dozens of pole owners in North Carolina to
5 attach to their utility poles, including IOUs, ILECs, municipally owned utilities,
6 and other electric cooperatives like Jones-Onslow.

7 **Q. Are poles owned by other utilities similar to the poles owned by Jones-Onslow,**
8 **and are TWC’s attachments similar as well?**

9 A. Yes. For example, Duke Energy and CenturyLink both own poles in and around
10 Jones-Onslow’s service territory, and those poles are virtually indistinguishable
11 from Jones-Onslow’s poles, except for the way they are tagged. TWC’s facilities
12 crisscross the territory served by Jones-Onslow, Duke and CenturyLink, meaning
13 that a mainline stretch of fiber or coaxial cable attachments might transition from
14 Jones-Onslow poles to Duke and/or Century Link poles and back to Jones-
15 Onslow poles. The attachments will look the same whether they are on a Duke
16 pole, a Century Link pole or a Jones-Onslow pole.

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

18 A. Yes. In my years of experience in the cable business and the construction of cable
19 systems, I have seen hundreds of pole attachment agreements. Because most
20 utility poles are similar, TWC’s attachments are generally the same no matter
21 whose pole is being used. And because the parties all face the same pole-
22 attachment related issues, the pole attachment agreements are often similar as
23 well. A collection of agreements across many pole owners in a region, such as
24 North Carolina, can serve as a barometer of what terms and conditions are just

1 and reasonable to address the utility's safety concerns in a commercially
2 reasonable manner.

3 But consideration of these agreements should account for the legal and
4 regulatory backdrop against which they are negotiated. Agreements with IOUs
5 and ILECs, for example, have long been subject to regulation, which means the
6 parties to them are generally on equal footing at the negotiating table.
7 Agreements with electric cooperatives and municipally owned utilities, however,
8 often have been negotiated in the absence of any legal or regulatory backstop. As
9 a result, those agreements can result in outliers, particularly when it comes to the
10 annual pole attachment rate.

11 **Q. Why is that?**

12 **A.** The existence of pole attachment regulation affects the parties' leverage in the
13 negotiations. As I discussed previously, TWC often has not had an alternative to
14 attaching to utility poles when building its cable system. This means TWC has
15 had to gain access to the utility's poles to build its network or extend service to a
16 new customer in the utility's service area. Where pole attachment rates, terms,
17 and conditions are not regulated, the utility enjoys all of the leverage in the
18 negotiation. While some unregulated utilities hew closely to industry standards,
19 others leverage their superior bargaining position to extract exorbitant rates and
20 excessive terms from the cable operator. Even where a complaint process exists,
21 some cable operators will feel compelled to bend to the utilities' excessive
22 demands to meet customer demand, rather than incur the costs, uncertainties, and
23 delays associated with litigation.

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

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

8 **Q. Do TWC's agreements in North Carolina reflect industry standards?**

9 A. Generally, "yes," with respect to terms and conditions in attachment agreements,
10 where only a few unregulated utilities have attempted to impose unreasonable
11 demands. But a number of previously unregulated cooperatives and municipal
12 utilities have imposed excessive annual pole attachment rates. TWC has disputed
13 many of these rates since the enactment of Section 62-350. In most of these
14 cases, TWC has asserted its rights under the statute and is paying the disputed rate
15 under protest or is paying a lower rate. In either case, TWC has paid the rate
16 subject to adjustment to a later-negotiated or adjudicated rate. In a few cases
17 TWC has been able to negotiate a resolution after the North Carolina Business
18 Court entered its orders in the Rutherford and Landis cases, and those decisions
19 either became final or were affirmed on appeal. We hope the resolution of this
20 case and the others the Commission is considering will give clarity to the parties
21 and allow TWC and the other pole owners to resolve these disputes.

22 **Q. What does TWC pay for its attachments to poles in North Carolina?**

23 A. Attached as Exhibit 14 is a chart documenting the annual pole attachment rates
24 paid by TWC to pole owners across the state since 2011. We have marked the

1 disputed rates TWC is paying under protest and/or subject to true-up with an
2 asterisk.

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

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

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

15 A. The rates charged under the FCC formula change from year to year based upon
16 the pole owner’s costs. But we can verify whether it complies with the FCC’s
17 formula largely by using the utility’s publicly reported data. In 2016, the highest
18 average rate we paid to IOUs in North Carolina was \$6.41 per pole. For the same
19 year, the average of the rates we paid to ILECs in North Carolina was \$3.56 per
20 pole. The tables below show the highest rates we paid to each IOU and ILEC in
21 North Carolina since 2011 and the average of those rates for each year.

22

1

Table 1: Maximum Rates TWC Paid IOUs In North Carolina

Investor-Owned Electric Utility	2011	2012	2013	2014	2015	2016
Dominion Power	\$6.39	\$7.67	\$7.70	\$12.80 (Tel.)	\$12.01 (Tel.)	\$6.64
Duke Energy	\$5.52	\$4.97	\$4.97	\$4.96	\$5.20	\$5.20
Progress Energy	\$6.40	\$6.40	\$5.60	\$5.25	\$5.38	\$7.39
Average Highest IOU Rates	\$6.10	\$6.35	\$6.09	\$5.11*	\$5.29*	\$6.41

2

*Telecom Rates are not included within the average.

3

Table 2: Maximum Rates TWC Paid ILECs in North Carolina

Incumbent Local Telephone Co.	2011	2012	2013	2014	2015	2016
AT&T	\$4.03	\$4.03	\$2.92	\$3.01	\$2.48	\$2.48
CenturyLink	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00
Frontier	\$4.59	\$4.59	\$4.00	\$4.00	\$3.42	\$3.42
Windstream	\$6.25	\$6.25	\$3.34	\$3.34	\$3.34	\$3.34
Average Highest ILEC Rates	\$4.97	\$4.97	\$3.82	\$3.84	\$3.56	\$3.56

4

1 IV. **THE COOPERATIVE'S PROPOSED REQUIREMENT**
2 **RELATED TO UNIVERSAL BROADBAND SERVICE**

3 **Q. Do you have any comments about the Cooperative's position that TWC**
4 **should be required to provide universal broadband service in exchange for a**
5 **pole attachment rate set in the neighborhood of the FCC Cable Rate?**

6 A: Yes. This proposal is flawed, not least because it is based on the false premise
7 that the FCC Cable Rate is artificially low. I'm not an economist, but TWC's
8 expert Ms. Kravtin is, and her testimony explains in detail why the FCC's Cable
9 Rate plus the direct fees paid by TWC for applications and make-ready work
10 already recover all of the Cooperative's direct costs that can be attributed to
11 TWC's use of surplus space on the poles. This proposal is also misplaced
12 because obligations related to TWC's system expansion are properly addressed in
13 TWC's franchise agreements or left to TWC's business discretion. They are not
14 properly the subject of pole attachment agreements. It is my understanding that
15 pole attachment rates are regulated because the pole owners have a monopoly
16 over an essential facility to cable operators and other third-party licensees. It
17 makes no more sense to talk about imposing an obligation for extending
18 broadband service as the price for just and reasonable pole attachment rates than it
19 would to impose an obligation on Walmart to increase its minimum wage to
20 employees as the price of keeping electric rates for Walmart at a reasonable level.

21 **Q. How does TWC determine where it extends service?**

22 A. Generally three factors inform those decisions. First, under federal law, TWC is
23 required to have either a local or state-issued franchise for the areas where it
24 provides services. Typically a local franchise agreement will contain a
25 requirement for providing service where a certain density threshold is satisfied.

1 For example, a franchise might require service anywhere in the franchise area
2 where there are 25 homes per mile. Most of TWC franchises are now state-
3 issued. A state issued franchise simply requires that a provider commence service
4 in the service area chosen by the applicant within 120 days of its filing of a notice
5 for a state issued franchise and that in its extension of service, it not discriminate
6 based on race or income. N.C.G.S. § 66-352(b). Second, for new residential or
7 commercial developments, TWC looks at the cost of constructing plant in those
8 areas and providing services, in addition to the competitive environment. Third,
9 TWC will consider on a case-by-case basis requests for service from customers
10 who currently are not capable of receiving services from TWC. The cost of
11 service can be extraordinarily high in rural areas where there are only a few
12 potential customers per mile.

13 **Q. Have you ever seen a pole attachment agreement that included a term or**
14 **condition related to broadband or any other service like the one proposed by**
15 **Jones-Onslow?**

16 **A.** In my 39 years of experience, I have never seen a pole attachment agreement that
17 imposed any sort of obligation on the attaching entity related to the nature or
18 geographic scope of its services. This is not surprising because service
19 obligations and commitments have no place in pole attachment agreements.

20 **V. JONES-ONSLow'S UNFOUNDED AND UNREASONABLE DEMAND**
21 **FOR PENALTIES AND FEES**

22 **Q. When did Jones-Onslow make its demand for penalties and fees related to**
23 **alleged unauthorized attachments?**

24 **A.** In November 2015, a letter was forwarded to me demanding payment of more
25 than one-million dollars for over 3,000 poles with alleged unauthorized
26 attachments, purportedly found during an inventory Jones-Onslow conducted of

1 TWC's attachments. Ex. 15. We had not received any notification of Jones-
2 Onslow's planned audit, and never had the opportunity to participate in the audit.

3 **Q. What was the basis for Jones-Onslow's demand?**

4 A. According to Jones-Onslow's demand, the amount was for pole attachment rental
5 fees going back 17 years, all the way to its last audit in 1998, with a 12% annual
6 interest rate and unauthorized attachment penalty of \$112 per attachment.

7 **Q. Does the 2007 Agreement include any provisions addressing these issues?**

8 A. Yes. The 2007 Agreement calls for an initial "baseline" audit that would
9 determine the number of poles with TWC attachments on a going forward basis.
10 The Agreement specifically says that all attachments counted in the baseline audit
11 will be deemed "Authorized," meaning Jones-Onslow is not entitled to charge any
12 back-rent, unauthorized attachment fees, or other penalties for them.

13 **Q. Please elaborate.**

14 A. Article 4.3 (in Exhibit 1) provides that "Commencing not less than one (1) year
15 following the Commencement Date, and no more frequently than every five (5)
16 years, an actual inventory of Attachments may be made by Owner or Owner's
17 representative at the expense of Licensee." Jones-Onslow is required to "provide
18 reasonable notice to Licensee of such inventory so that Licensee has an
19 opportunity to participate in the inventory." Article 12.1 adds that "[a]ny
20 Attachment that existed prior to the Commencement Date ("Pre-Existing
21 Attachment") of this Agreement and which is counted in the first actual inventory
22 conducted under this Agreement pursuant to Article 4 will be considered an
23 Authorized Attachment." The article specifies that "attachments counted in such
24 first actual inventory, plus all new attachments permitted following the

1 Commencement Date, shall be the base line of authorized attachments for any
2 later attachment inventories.” The Commencement Date is the date of the
3 signatures on the agreement, the last of which is dated July 18, 2007.

4 **Q. Is there a reason why the parties agreed to a baseline audit in the 2007**
5 **Agreement?**

6 A. Yes. Jones-Onslow testified in its deposition that the prior inventory, conducted
7 in 1998, found a discrepancy between the number of poles with TWC’s
8 attachments and the number of poles for which it had been invoicing TWC. See
9 Ex. 13, Pritchard Depo. at 136:7-141:12. Specifically, Jones-Onslow found that it
10 had been under-billing TWC by about 10 percent. It is unclear why this mismatch
11 existed or what caused it. In any event, Jones-Onslow decided not to adjust its
12 billing records or fix the discrepancy at that time, because it believed its billing
13 records to be more accurate. As a result, between 1998 and 2007, Jones-Onslow
14 knew that its invoices to TWC did not match the number of attachments it had
15 counted in the 1998 audit. It makes sense that the 2007 Agreement would call for
16 a baseline audit to fix this known mismatch between Jones-Onslow’s billing
17 records and the number of attachments in the field.

18 At the same time, from TWC’s perspective, while I was not involved in
19 any negotiations of the 2007 Agreement, I know that TWC often seeks to have a
20 baseline audit provision like the one in the Jones-Onslow agreement contained in
21 its pole attachment agreements. TWC seeks that provision in recognition that the
22 current attachment count may not be fully accurate, often because drop poles have
23 not always been counted. While TWC recognizes that drop pole attachments are
24 appropriate to be counted, they should not be penalized as unauthorized

1 attachments when the practice has not been to count them. In any event, baseline
2 audit provisions, such as the one in the Jones-Onslow agreement, provide for
3 setting a new baseline for the number of attachments to be billed, so that the
4 parties can move forward without further contention regarding the proper number
5 of attachments to be billed for.

6 **Q. You have used the term “drop pole.” Would you define that for us?**

7 A. Sure, a drop pole is a pole installed to provide clearance (typically across a street)
8 to provide service to a customer’s location, usually outside the main distribution
9 pole line. These poles are sometimes called secondary poles, or lift poles.

10 **Q. Do you consider the 2015 inspection the first actual inventory under the 2007**
11 **Agreement?**

12 A. We are not aware of any prior audit having been conducted by Jones-Onslow as
13 required in the 2007 Agreement. Even though Jones-Onslow did not notify us of
14 the inspection or allow us to participate, as required by the 2007 Agreement, we
15 would accept the results of the 2015 inspection as the baseline audit. After all,
16 Jones-Onslow explained that the inspection confirmed the data that was already in
17 the Cooperative’s mapping database, which had been updated using information
18 submitted by TWC over the years. See Ex. 13, Pritchard Depo. at 135:7-137:1,
19 142:13-20. Under the terms of the 2007 Agreement, all of the poles with TWC
20 attachments counted during this inspection should be considered “authorized.”

21 **Q. Do you think it is appropriate or reasonable for Jones-Onslow to seek back-rent,**
22 **unauthorized attachment penalties, and interest for the poles with TWC**
23 **attachments identified in the 2015 inspection?**

24 A. No. It is totally unreasonable for Jones-Onslow to seek back-rent and penalties
25 going back nearly 20 years when it has no right to do so under the 2007

1 Agreement. That the Cooperative did not conduct the audit in the 2007 time
2 period as required in the Agreement does not give it any right to claim that the
3 attachments it would have picked up in that audit are “unauthorized” and subject
4 to penalty and interest. As noted earlier, Jones-Onslow knew, from the very
5 beginning, that its billing information did not match the number of poles with
6 TWC attachments in the field. Jones-Onslow chose to keep using the same billing
7 information for another 20 years without trying to reconcile the numbers. Nor did
8 the Cooperative determine the source and cause of the mismatch until it
9 conducted its inspection in 2015. Indeed, the actual number of poles with TWC’s
10 attachments was apparently accurately represented in Jones-Onslow’s mapping
11 data all along, based on information supplied to the Cooperative by TWC. See
12 Ex. 13, Pritchard Depo. at 137:7-10. In short, TWC should not be required to pay
13 millions of dollars because Jones-Onslow chose not to follow the requirements of
14 the contract or to get to the bottom of billing records it knew, or had reason to
15 know, were wrong. The baseline audit provision, which Jones-Onslow expressly
16 agreed to, is intended precisely to avoid this sort of “gotcha” situation, where the
17 pole owner all of sudden seeks to impose grossly disproportionate penalties for
18 prior periods.

19 **Q. Are there other reasons why you believe it is unreasonable for Jones-Onslow to**
20 **demand unauthorized attachment penalties under the 2007 Agreement?**

21 A. Yes. Even if Jones-Onslow could characterize some of these attachments as
22 “unauthorized” under the 2007 Agreement, Article 10.1 requires the Cooperative
23 to notify TWC “of any Unauthorized Attachment when discovered, as set forth in
24 Exhibit B-6.” See Ex. 1. Exhibit B-6, the Notification of Unauthorized

1 Attachment form requires the Cooperative to identify the alleged unauthorized
2 attachment by location, so we can confirm whether the attachments were truly
3 unauthorized and file a permit application for any such attachments.

4 **Q. Did Jones-Onslow provide notification of the alleged unauthorized attachments?**

5 A. No, Jones-Onslow has not and cannot identify which of the total attachments
6 counted during its audit were the allegedly unauthorized attachments. Ex. 13,
7 Pritchard Depo. at 147:15-149:2. Again, this is not surprising given the
8 inaccuracies Jones-Onslow has known about for 20 years.

9 **Q. Do you have any understanding of why Jones-Onslow has made this demand**
10 **now?**

11 A. As I mentioned above, I believe Jones-Onslow made this demand to exert
12 leverage in the parties' negotiation and force TWC to agree to the excessive pole
13 attachment rate Jones-Onslow wants to charge. This is a fairly common tactic
14 that I have observed over the years in these sort of negotiations.

15 **VI. CONCLUSION**

16 **Q. Does this conclude your direct testimony?**

17 A. Yes.