IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-905

Filed: 7 April 2015

Rutherford County, No. 13-CVS-231

RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, Plaintiff,

v.

TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP, D/B/A TIME WARNER CABLE, and TIME WARNER CABLE SOUTHEAST, LLC, Defendants.

Appeal by Plaintiff from order and opinion entered 22 May 2014 by Judge Calvin E. Murphy in the North Carolina Business Court. Heard in the Court of Appeals 4 December 2014.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason and Christopher J. Blake, for Plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Reid L. Phillips; and Sheppard Mullin Richter & Hampton LLP, by Gardner F. Gillespie, Paul Werner, and J. Aaron George, for Defendant.

Womble Carlyle Sandridge & Rice, LLP, by Pressly M. Millen and Raymond M. Bennett, for amicus curiae North Carolina Association of Electric Cooperatives, Inc.

The Bussian Law Firm, PLLC, by John A. Bussian, for amicus curiae North Carolina Cable Telecommunications Association.

STEPHENS, Judge.

Rutherford Electric Membership Corporation ("Rutherford") argues that the North Carolina Business Court erred in holding that the utility pole attachment rates

it charged Time Warner Cable Entertainment-Advance/Newhouse Partnership ("TWEAN")[1] between 2010 and 2013 were neither just nor reasonable under section 62-350 of our General Statutes. Rutherford also argues that the Business Court erred in concluding that it violated section 62-350 by unilaterally raising TWEAN's rates without negotiation during the years in dispute. After careful consideration, we hold that the Business Court did not err and we consequently affirm its order and opinion.

I. Background and Procedural History

A. Regulatory Background

For approximately 35 years, the Federal Communications Commission ("FCC") has regulated the pole attachment rates that certain utility companies may charge cable service providers within North Carolina and around the nation. Section 224 of the federal Pole Attachment Act of 1978 amended the Communications Act of 1934 to provide that investor-owned utilities ("IOUs") may only charge utility pole attachment rates that are just and reasonable, based on the utility's incremental costs incurred in providing a pole attachment service and an appropriate share of its fully allocated costs, which would exist even in the absence of any pole attachments. *See* 47 U.S.C. § 224 (2014). Developed pursuant to section 224's enactment, the FCC

[1] This dispute arose in 2010 between Rutherford and TWEAN. In 2012, TWEAN's corporate subsidiary Time Warner Southeast, LLC, assumed all of its parent company's rights, obligations, and liabilities relating to cable operations in North Carolina, and was subsequently joined as a necessary party to this litigation.

Cable Rate provides a formula for charging an attaching party a percentage of the actual, documented costs of owning and maintaining a utility pole based on the proportion of the usable space[2] on the pole occupied by the attacher. *See id.* § 224(d). In 1996, Congress amended section 224 to include an alternative formula called the FCC Telecom Rate, which followed a similar approach for calculating the cost of a pole but utilized a different method for allocating those costs to attachers by including both usable and unusable pole space into its calculations for the amount of space each attacher occupies. *See id.* § 224(e). However, in 2011, the FCC adjusted the Telecom Rate formula to produce maximum rates more closely aligned with those provided by the FCC Cable Rate.

Unlike IOUs, municipally owned utilities and non-profit electric membership corporations ("EMCs") are exempt from federal regulation by the FCC. Thus, given the absence of any comparable state legislation here in North Carolina prior to 2009, pole attachment rates went effectively unregulated for such utilities providers. Indeed, when TWEAN attempted to challenge the pole attachment rates set by a

[2] Utility poles come in standard sizes, typically in five-foot increments, and utilities usually use 35- and 40-foot poles for distribution of electricity and communications services. Of that space, utilities bury approximately six feet of the pole underground. Then, to meet "minimum grade" and achieve ground clearance, the utility typically leaves at least 18 feet of pole space unused between the ground and any installation. As such, every utility pole has roughly 24 feet of unusable space either buried underground or required to achieve minimum ground clearance. Thus, each 35- and 40-foot pole has 11 feet and 16 feet, respectively, of usable space to accommodate overhead facilities, and the FCC Cable Rate therefore uses a presumptive average of 13.5 feet of usable space per pole, although the formula allows a utility to substitute its actual data where available.

North Carolina EMC in federal court in 2007 under common law principles, the United States Court of Appeals for the Fourth Circuit flatly rejected its argument and held that, "if any regulation or compulsion is to be applied to pole-attachment agreements, it should be done by the North Carolina legislature, the North Carolina Utilities Commission, [or] the North Carolina state courts." *Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 315 (4th Cir. 2007). In so holding, the Fourth Circuit set the stage for our General Assembly's enactment of N.C. Gen. Stat. § 62-350.

As enacted in 2009, section 62-350 requires that municipalities and EMCs organized under Chapter 117 of our General Statutes "shall allow any communications service provider to utilize [their] poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements." N.C. Gen. Stat. § 62-350(a) (2013). Included in the definition of "communications service provider" ("CSP") are those that provide "cable service over a cable system as those terms are defined in Article 42 of Chapter 66 of the General Statutes." *Id.* § 62-350(e). The statute further provides that:

> Following receipt of a request from a communications service provider, a municipality or membership corporation shall negotiate concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduits that it owns or controls. . . . Upon request, a party shall state in writing its objections to any proposed rate, terms, and conditions of the other party.

Id. § 62-350(b). However, if the parties are unable to reach an agreement "within 90 days of a request to negotiate . . . , or if either party believes in good faith that an impasse has been reached . . . , either party may bring an action in [the North Carolina Business Court] . . . , and the Business Court shall have exclusive jurisdiction over such actions." *Id.* § 62-350(c). In such cases, the statute provides that the Business Court shall

> resolve any dispute identified in the pleadings consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions, taking into consideration and applying such other factors or evidence that may be presented by a party, including without limitation the rules and regulations applicable to attachments by each type of communications service provider under section 224 of the Communications Act of 1934, as amended, and [] 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 lawsuit, whichever is earlier.

Id. In the only case heretofore brought under this statute, this Court interpreted section 62-350 to "endorse[] regulatory intervention to promote just and reasonable rates" by "establish[ing] several judicially enforceable statutory rights" including "a statutory right for both [CSPs] and municipalities to establish just, reasonable, and nondiscriminatory pole attachment rates within 90 days of a request to negotiate" and "a private cause of action to enforce these rights." *Time Warner Entm't*

Advance/Newhouse P'ship v. Town of Landis, __ N.C. App. __, __, 747 S.E.2d 610, 615-16 (2013) (citations and internal quotation marks omitted).

B. Facts and Procedural History

Rutherford is an EMC organized under Chapter 117 of our General Statutes that owns and operates an electric distribution system consisting of overhead and underground lines used to provide electric service to its members in its service territory, which covers all or portions of 10 North Carolina counties. As part of its system, Rutherford owns utility poles to which it attaches its overhead distribution lines. Rutherford also maintains "joint-use" arrangements with incumbent local telephone companies and electric utilities under which Rutherford typically does not pay for its use of space on the other party's poles, nor does it charge the other party for using space on its poles; instead, the joint-user pays the pole owner for any expenses associated with accommodating its facilities. In addition, Rutherford licenses the use of surplus space on its poles to CSPs and other third-party attachers.

On 5 March 1998, Rutherford and TWEAN entered into a pole attachment agreement, the terms of which largely followed Rutherford's standard third-party CSP attachment agreement and obligated TWEAN to pay an annual, per-pole rental rate of $5.25 in exchange for the right to attach to surplus space on Rutherford's poles. The agreement provided that where there was no surplus space on a pole, including sufficient safety space and ground clearance, TWEAN would create space by

purchasing a new, larger pole, entirely at its own expense. Moreover, if Rutherford reclaimed space on the pole for its own attachments, TWEAN either had to move its attachment to create new safety space or, if there was insufficient space to maintain minimum requirements for ground clearance or safety space, pay to install a taller pole. In both cases, the agreement provided that Rutherford would take ownership of the new pole and TWEAN would continue paying the same rate to attach to it.

In 1999, Rutherford increased the rate it charged TWEAN to $5.50 per pole. In 2004, Rutherford exercised its option to terminate the 1998 pole attachment agreement and the parties spent the next eight years unsuccessfully attempting to reach a new agreement, while Rutherford continued to invoice TWEAN for its attachments at gradually increased rates. In 2005, the rate was $7.50 per pole; in 2006, $9.50 per pole; in 2007, $11.50 per pole; in 2008, $12.50 per pole; in 2009, $14.50 per pole; in 2010, $15.50 per pole; in 2011, $18.50 per pole; in 2012, $19.19 per pole; and in 2013, $19.65 per pole.

Prior to section 62-350's enactment, TWEAN lacked any means to challenge Rutherford's rates and thus continued to pay the amounts invoiced until 2009. Then, on 18 December 2009, TWEAN objected to Rutherford's invoiced rates and requested negotiations for the rate, terms, and conditions of a new license agreement pursuant to section 62-350. Over the next 39 months, the parties negotiated in good faith but were unable to reach an agreement. In the meantime, TWEAN refused to pay

Rutherford's 2010 rate of $15.50 per pole and instead paid the 2009 rate of $14.50 per pole, subject to a true-up based on a negotiated or adjudicated rate and without prejudice to either party. In response, Rutherford threatened to demand removal of 481 TWEAN attachments, which was the number of poles equal to the amount of the outstanding balance, unless TWEAN paid the full invoiced amount for 2010. TWEAN responded by letter that Rutherford did not have the authority to unilaterally raise its rates or remove its attachments, and continued to pay $14.50 per pole, subject to true-up and without prejudice, through 2011 and 2012 while Rutherford continued to demand payment of the unpaid invoices and refused to provide TWEAN with financial data and documents that it requested in conjunction with the ongoing negotiations. In 2013, TWEAN offered to pay Rutherford's invoices at a rate of $7.50 per pole, but Rutherford objected and refused to accept any such payment. By February 2013, after more than three years of unsuccessful negotiations, the parties reached an impasse as to the maximum permissible rates under section 62-350 for the years 2010 through 2013. During these years, Rutherford invoiced TWEAN for attachments on the following number of poles: 7,269 poles in 2010; 7,336 poles in 2011; 7,336 poles in 2012; and 7,384 poles in 2013. All of TWEAN's attachments were concentrated in two of the 10 counties in Rutherford's service area, near Gastonia in Gaston County and Shelby in Cleveland County.

On 1 March 2013, Rutherford filed a complaint against TWEAN seeking adjudication under section 62-350 of the lawfulness of its rates for 2010 through 2013, as well as a money judgment for amounts invoiced to but unpaid by TWEAN and a declaratory judgment that its rates would be considered just and reasonable going forward. The case was designated a mandatory complex business case on 7 March 2013 and subsequently assigned to the North Carolina Business Court on 12 March 2013. In its answer filed 4 April 2013, TWEAN asserted affirmative defenses and counterclaimed that: (1) Rutherford's pole attachment rate was neither just nor reasonable under section 62-350; (2) Rutherford violated section 62-350 by continuing to increase its rates without negotiation; and (3) several of Rutherford's non-rate terms also violated section 62-350. On 1 August 2013, the Business Court joined TWEAN's corporate subsidiary TWC Southeast, LLC, as a necessary party to the litigation. The parties resolved their disputes over Rutherford's non-rate terms before trial.

On 3 September 2013, with Judge Calvin E. Murphy presiding, the Business Court began a four-day bench trial to determine whether Rutherford's pole attachment rates for 2010 through 2013 were just and reasonable under section 62-350. Given the statute's explicit reference to "section 224 of the Communications Act of 1934," TWEAN argued that the court should base its determination on the FCC Cable Rate, which calculates the maximum rate an IOU can charge by: (1)

determining the net cost of an average utility pole; (2) multiplying that cost by carrying charge factors to determine the utility's annual cost of owning and maintaining an average pole; and then (3) allocating a portion of that annual cost to the third-party attacher proportionate to the amount of usable space on the pole it occupies. *See* 47 U.S.C. § 224(d). For its part, Rutherford generally agreed that the cost of a pole should be calculated based on the first two elements of the FCC Cable Rate, but strenuously objected to allocating those costs based on the formula's third element, which Rutherford contended would result in a subsidy to TWEAN at the expense of its member-owners. Instead, Rutherford argued for a rate based on the allocation of both usable and unusable pole space to third-party attachers like TWEAN.

During the trial, Rutherford presented testimony from three witnesses in support of its rates. First, Rutherford's system engineer Thomas Haire, whose duties included overseeing the development and negotiation of rates, terms, and conditions for pole attachment agreements, testified that he relied on a combination of formulaic rate methodologies from the "Pole Attachment Toolkit" published by the National Rural Electric Cooperatives' Association ("NRECA") in order to gradually increase attachment rates for TWEAN and nearly all of Rutherford's other third-party attachers to make them closer to the rates charged under its agreement with Bell

South.[3] Specifically, Haire testified that Rutherford was willing to follow the FCC Cable Rate as a guide as long as it produced a sufficient maximum rate to justify the desired annual rate increase. When that failed, Haire turned to NRECA's Telecom Plus formula, which uses calculations identical to the FCC Cable Rate to derive the annual net cost of owning and maintaining a pole, but differs in its allocation of costs. Unlike the FCC Cable Rate, which allocates the costs of the entire pole in the proportion that the attaching party uses the usable space, the Telecom Plus formula allocates the pole's usable space in the same manner but then further allocates its unusable space equally among all of the attaching parties. Here, Haire testified that he allocated the unusable space by dividing the costs by Rutherford's system-wide average of attaching parties per pole. Thus, Haire testified that his calculations—which presumed a standard 40-foot pole[4] with 13.5 feet of usable space of which Rutherford utilized 6.5 feet and every CSP attachment occupied 4.33 feet—produced

[3] Under the terms of its joint-use agreement with Bell South (now AT&T), Rutherford agrees to install, at its own expense, poles large enough to insure sufficient space for Bell South to make an attachment, which means that if a jointly used pole is insufficient in size or strength to accommodate existing attachments and Bell South's proposed attachments, Rutherford will pay the cost to promptly replace the pole with a taller, stronger one. Bell South and Rutherford also agreed to use a 40-foot pole as the standard joint-use pole with a standard space allocation of two feet for Bell South's attachments and 8.5 feet for Rutherford's attachments. Further, the agreement gives Bell South priority by specifying that any attachments by third parties would "not be located within [two feet of Bell South's] space allocation." The agreement requires each party to pay an annual per-pole rental fee for its attachments on the other's poles. In 2012, Bell South paid $18.12 per pole for 18,335 attachments to Rutherford's poles, and Rutherford paid $24.98 for each of its 1,026 attachments to Bell South's poles.

[4] Haire testified that Rutherford had previously used 35-foot poles throughout its system, but that over the last 25 years, it transitioned to using 40-foot poles, at least in part to accommodate its joint-use agreements with other utilities.

a range of potential attachment rates that were higher than the rates Rutherford actually charged TWEAN, thus rendering the latter just and reasonable under section 62-350. Furthermore, echoing the testimony of several other Rutherford witnesses, Haire testified that by 2012, Rutherford had licensing agreements with ten third-party attachers including TWEAN; that although several other attachers had complained about Rutherford's pole attachment rate, TWEAN was the only attacher that refused to pay it; and that Rutherford generally refused to lower or even negotiate its pole attachment rate with individual attachers because it was required to charge nondiscriminatory and uniform class-based rates.

On cross-examination, Haire explained that even though an average CSP attachment occupies only one foot of space, Rutherford attributed 4.33 feet to TWEAN's attachments based on the National Electric Safety Code's ("NESC") requirement that poles with communications facilities maintain sufficient "safety space"—typically 40 inches—between those communications facilities and electrical conductors. However, Haire acknowledged that the NESC allows electric utilities like Rutherford to use this safety space for certain types of attachments provided they maintain minimum separations, and further admitted that on at least some of its poles, Rutherford generated revenue by using the safety space to install streetlights. Haire also admitted that although NRECA's Telecom Plus formula calls for dividing the cost of unusable space equally among all attachers, his calculations based on

Rutherford's system-wide averages divided the cost of unusable space by only 1.45 attaching parties, which resulted in a higher rate. Haire explained this was necessary because Rutherford lacked data on how many of its poles with TWEAN attachments included other attachers besides Rutherford itself. He further acknowledged that in determining the annual average costs of Rutherford's poles, he miscalculated the carrying charge component by failing to divide Rutherford's maintenance expenses by its net investment in overhead conductors and service lines, and he also erroneously used a "default" rate of return rather than Rutherford's actual rate of return, even though he had no basis to use the default and the default was higher than the rate of return used by Rutherford's other experts. Haire also admitted that the NRECA toolkit he relied on described the FCC's rate methodologies as "unimpeachable" and cautioned that although the Telecom Plus formula generated higher pole attachment rates by allocating more costs to attachers, "it has not been sanctioned by the FCC and may not be readily embraced by state or federal regulators."

Rutherford next presented expert testimony from Judy Beacham, an outside consultant who acknowledged that she had never previously performed a pole attachment rate analysis and that in formulating her rate methodology she relied primarily on a position paper prepared by a lawyer for the National Association of Regulatory Utility Commissioners ("NARUC") on behalf of a number of IOUs for

presentation to the FCC in 1996. After testifying about the history of EMCs, their importance in bringing electrical power to sparsely populated rural areas, and the impact of their tax-exempt non-profit status on their costs and finances, Beacham offered calculations that followed the basic outlines of the Telecom Plus rate methodology. However, Beacham acknowledged that her calculations departed from NRECA's formula in several notable ways. First, Beacham increased the cost of a bare utility pole in Rutherford's system by adding in the costs of ancillary supporting equipment, such as anchors, guys, grounds, and lightning arresters, which would be on any pole to support the utility's core services regardless of whether there were any attachments. Second, Beacham added to the expenses included in the carrying charge, including a category called "operations related expenses" that is not found in the FCC Cable Rate or NRECA's Telecom Plus formula. Third, while Beacham purported to follow the Telecom Plus method for allocating unusable space, she acknowledged that her calculations were missing critical data inputs because although her approach required information on the number of entities attached to an average joint-use pole, Rutherford kept no such statistics. Indeed, Beacham admitted that if the average pole to which TWEAN attached had more than 2.4 attaching entities, or that if a third entity such as Bell South was attached to 40 percent or more of Rutherford's poles to which TWEAN was also attached, her methodology would not justify Rutherford's rates. On cross-examination, Beacham admitted she

was unaware of the fact that in 2001, NARUC's board resolved that states should regulate all pole attachment rates, including those for municipalities and EMCs, according to the FCC Cable Rate "because it is simple, it is fair and reasonable, it uses readily identifiable information and it avoids disputes."

Finally, Rutherford offered expert testimony from Gregory Booth, an engineer who performed a rate analysis as well as a Times Interest Earned Ratio ("TIER") analysis on Rutherford's rates. Booth's rate analysis combined several formulas to calculate a range of maximum just and reasonable rates based on an equal allocation of the usable and unusable space occupied by the attacher. However, despite his testimony that the costs of unusable pole space should be paid for evenly by each party that occupies the pole, Booth employed the same unusable space allocation methodology as Haire, dividing the unusable space by 1.45 rather than recognizing that, by definition, each of Rutherford's poles to which TWEAN attaches must have a minimum of two attachers—i.e., TWEAN and Rutherford. Booth defended his space allocation methodology by claiming that the average pole TWEAN attaches to is more expensive for Rutherford, but Rutherford presented no evidence to support this assertion, nor did it present any data about how many (or which) poles in its system have one or more third-party attachments. Also like Haire, Booth allocated 100% of the NESC-required safety space to TWEAN in his calculations, thereby increasing the one-foot of usable space TWEAN's attachments occupy by an additional 40 inches,

which he justified by reasoning that were it not for TWEAN's attachments, the safety space would not be required and Rutherford would be able to make fuller use of the usable space on its poles. Unlike Haire, Booth's calculations for determining Rutherford's costs and the amount of space to allocate per attacher utilized an average of only 10.83 feet of usable space per pole.

Based on his TIER analysis, Booth claimed that even at its current pole attachment rates, financially speaking, Rutherford's bottom line would be better off without any third-party communication attachments like TWEAN's, although his analysis relied on the assumption that the only reason Rutherford uses 40-foot poles, instead of cheaper 35-foot poles, is to provide pole attachment space for TWEAN and other communications licensees. Moreover, Booth testified that while Rutherford might eventually recoup its investment in those more expensive poles at its present attachment rates, applying the FCC Cable Rate would amount to an improper subsidy for TWEAN at the expense of Rutherford's member-owners.

To support its argument that Rutherford's rates for the disputed years were neither just nor reasonable under section 62-350, TWEAN relied on expert testimony from economist Patricia Kravtin. She testified that by applying the FCC Cable Rate to Rutherford's financial data, the maximum just and reasonable pole attachment rates for each year in question were $2.68 in 2010, $2.56 in 2011, $2.57 in 2012, and $2.64 in 2013. She also offered alternative calculations based on the higher inputs

Rutherford's experts used to determine the net bare costs of a pole, which resulted in a slight increase in the maximum just and reasonable pole attachment rates for the disputed years to $3.63 for 2010, $3.51 for 2011, $3.51 for 2012, and $3.55 for 2013. As Kravtin explained, the differences between her rate calculations and those proposed by Rutherford's experts were driven primarily by Rutherford's method of allocating unusable pole space to TWEAN and other third-party attachers. Kravtin testified that in her view, by charging attachers in proportion to the usable space they occupy on the pole, the FCC Cable Rate provides a more just and reasonable allocation of costs, in the same way that it makes more sense to charge a tenant who occupies only one floor of a ten-story apartment building 10 percent of the costs of the building's common space. Kravtin also took issue with Booth's allocation of 100 percent of the NESC-required safety space to the attacher, given the evidence that Rutherford still made use of the space itself, and with Booth's argument that applying the FCC Cable Rate would result in a subsidy for TWEAN, arguing instead that if anything, attachments leave utilities like Rutherford in a better position economically because they can generate additional revenue by utilizing surplus space on their poles while attachers pay the resulting incremental cost increases. Moreover, Kravtin testified that although it was initially intended to apply only to IOUs, the FCC Cable Rate is more widely applicable and more straightforward to calculate than the formulas Rutherford's experts relied on because it utilizes clear, readily accessible

data inputs and presumptive averages rather than detailed statistics that EMCs including Rutherford simply do not maintain.

On 22 May 2014, the Business Court issued an order and opinion holding that the pole attachment rates Rutherford charged TWEAN between 2010 and 2013 are unjust and unreasonable under section 62-350, and that Rutherford violated section 62-350 by unilaterally increasing its rates during those years without first negotiating with TWEAN. In its findings of fact, the Business Court noted that although section 62-350 allows it to consider and "apply other evidence presented by the parties to determine whether [Rutherford's] rates are just and reasonable, the Court looks first to the FCC's methods for setting maximum just and reasonable pole attachment rates, given the express instruction for the Court to consider the FCC approach outlined in Section 224." The Court further found that the FCC Cable Rate "provides an economically justified means of reasonably allocating costs" and "promotes uniformity in pole attachment rates across the state" because its formula is "applicable to all manner of utilities regardless of differences in costs, the number of attaching entities, or other variables." Indeed, as the Court noted, even NRECA, which promulgated the Telecom Plus formula on which Rutherford's experts partially relied, has stated that rates established according to the FCC's rules are "unimpeachable" because "the FCC rate formulas are sanctioned by the U.S. Congress, have been adopted by most of the states that regulate pole attachments

and are the most widely accepted methodologies for calculating pole attachment rates." Thus, the Business Court found that

> it is appropriate to consider the rates yielded by the FCC Cable Rate formula in determining whether [Rutherford's] rates are just and reasonable. Not only is the Court directed to do so by § 62-350, but, by applying the facts presented in this case to an analytical structure that is well-understood, widely used, and judicially sanctioned, the Court is assured that it is not exceeding its judicial function. Moreover, the Court expects that reliance on established FCC precedent will, as the General Assembly intended, provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions.

However, the Court also emphasized that "this finding is based on the facts presented at trial in this case, and does not limit the Court from considering other methods of proving just and reasonable rates in future cases that may be brought under § 62-350."

The Business Court found that TWEAN's expert Kravtin was the only witness to provide credible evidence of what Rutherford's maximum just and reasonable rate would be under the FCC Cable Rate formula. Despite Rutherford's objections, it further found that Kravtin's use of the FCC Cable Rate's presumptive average of 13.5 feet of usable space per pole when deriving the space allocation factor "was reasonable given the lack of complete data from [Rutherford] on the average usable space on an average pole in its system."

By contrast, the Business Court found that the different rate methodologies that Rutherford's experts offered as proof that its rates were just and reasonable conflicted with each other and were not supported by credible evidence. As the Court noted, Rutherford's experts relied on NRECA's Telecom Plus formula and other methodologies which have "not been adopted by any court or administrative agency as a means of establishing a maximum just and reasonable rate." Moreover, the Court found that the evidence before it did not justify Rutherford's use of the Telecom Plus formula's equal allocation of unusable space in light of the unequal rights and benefits accruing to the parties under its standard third-party CSP attachment agreement. Nevertheless, the Court noted that it "might have been swayed by [Rutherford's] arguments regarding the equal allocation of the unusable space, if the attachers shared equal rights to the pole and the cost was indeed equally allocated." However, even assuming *arguendo* that Rutherford's decision to allocate unusable space to attachers was a defensible method for calculating a reasonable rate, the Court noted that Rutherford's experts all made critical errors in applying it. For example, the Court found that Haire's rate calculations were flawed because they were based on: (1) a miscalculation of the Telecom Plus formula's carrying charge element; (2) a failure to divide maintenance expenses; (3) an erroneous use of a default rate of return instead of Rutherford's actual rate of return; and (4) Haire's failure to divide the cost of unusable space equally among all attachers. The Court

found that when combined, these errors resulted in a 2012 rate that was nearly $8.00 higher than the Telecom Plus rate would yield if properly applied and $3.00 higher than what Rutherford actually charged TWEAN for that year. The Court also found Rutherford's expert Beacham's rate calculations similarly unpersuasive, given that her approach to space allocation required data on the number of entities on an average pole that Rutherford did not maintain.

The Business Court likewise found that Rutherford's expert Booth's rate analysis was flawed because his calculation that Rutherford's poles averaged only 10.83 feet of usable space was based not on actual data but instead on a series of flawed assumptions regarding the average height of Rutherford's poles, the average amount of space Rutherford uses on its poles, and the average number of third-party attachers per pole. The Court also rejected Booth's proposed allocation of 100 percent of the NESC-required safety space to TWEAN, which neither the FCC nor NRECA support and which the Court found would be unjust and unreasonable because Rutherford itself uses the safety space to generate revenue by installing streetlights. The Court further found that Booth's decision to allocate unusable space by dividing Rutherford's costs by only 1.45 attachers per pole after assigning the entire 40-inch safety space to TWEAN substantially increased TWEAN's rates but also contradicted his purported goal of equally allocating unusable space to each attacher, and was both unjust and unreasonable because "despite [Rutherford's] (and Bell South's) greater

use of the pole and more valuable rights, Booth's rate methodology assigns a significantly greater portion of the pole costs (over 60 percent) to [TWEAN] than to any other party on the pole, including the pole owner."

The Business Court also rejected both Booth's TIER analysis, which it found was too faulty to be relied upon because it ignored Rutherford's actual practices and the terms of its attachment agreement with TWEAN, and Booth's argument that application of the FCC Cable Rate would result in a subsidy to TWEAN at the expense of Rutherford's members. In its findings, the Court noted that Booth's underlying assumption—that Rutherford only installs 40-foot poles to support attachments by TWEAN and other third-party attachers—was contradicted by: (1) testimony from Rutherford's other witnesses that it has used 40-foot poles as its standard pole size for the past 25 years, regardless of whether CSPs were present, to accommodate other electric utilities who as joint-users do not pay for their attachments; and (2) the terms of Rutherford's agreement with TWEAN, which explicitly require TWEAN to pay to install and make ready new, larger poles—which Rutherford takes ownership of while TWEAN continues to pay to attach—when additional space is needed for its attachments. Thus, contrary to Booth's claims, the Court found that the FCC Cable Rate "actually leaves the utility and its customers better off than they would be if no attachments were made to their poles" because the cable attacher "pays most of the incremental 'but for' costs of attachment up front, as well as its share of the fully

allocated costs of pole ownership that necessarily would exist even absent its attachment." In terms of subsidies, the Court found that if anything, in light of the agreement's terms, they flowed the opposite direction because "[w]hen [TWEAN] pay[s] to create surplus space where it does not already exist, [Rutherford] benefits from receiving a taller, stronger pole that enhances [Rutherford's] network, and TWEAN remain[s] obligated to pay annual rent to maintain an attachment to that pole."

The Business Court also rejected Rutherford's argument that its rates from 2010 to 2013 should be considered just, reasonable, and binding on TWEAN simply because other CSPs such as Charter Communications continued to pay them, especially in light of the evidence in the record that Charter only continued to pay due to its reluctance or inability to litigate the issue. As for Rutherford's argument that applying the FCC Cable Rate would lead to an absurd result, given that Kravtin's calculations for a just and reasonable rate yielded sums less than half of what TWEAN had voluntarily agreed to pay in 1998, the Court acknowledged "the disparity between the FCC Cable rates calculated by Kravtin and the IOU rates, on the one hand, and the rates charged by [Rutherford], on the other hand," but nevertheless found that disparity "does not undercut the reasonableness of the former or justify the latter."

Ultimately, the Business Court concluded that Rutherford's pole attachment rates from 2010 through 2013 were not just and reasonable because they "greatly exceed the maximum just and reasonable pole attachment rates calculated under the FCC Cable Rate formula, and are not otherwise supported by the evidence and methodologies put forth by [Rutherford] and its experts." While acknowledging that section 62-350 "does not limit the Court's consideration [of whether a rate is just and reasonable] to only the [FCC] rules and regulations applicable under Section 224," it nevertheless concluded that "on the record before the Court in this case, the FCC Cable Rate formula offered the most credible basis for measuring the reasonableness of [Rutherford's] rates." The Court further concluded that contrary to Rutherford's interpretation of section 62-350's use of the term "nondiscriminatory" to mean that its rates should be deemed reasonable because other third-party CSP attachers in the same class as TWEAN accepted them, the statute's detailed provisions requiring EMCs to negotiate when requested "would be meaningless if [Rutherford] could dictate the rates and terms of attachment for every communications service provider once it reached an agreement with a single one." After noting that our General Assembly could have expressly insulated class-based rates from review in individual cases but did not, the Court concluded that "other third-party attachers' acceptance of [Rutherford's] rates may be weighed as evidence . . . [but] will not foreclose [judicial] review under § 62-350." Consequently, the Court also held that Rutherford violated

section 62-350 by unilaterally increasing TWEAN's rates without negotiation. Given the statute's plain language and its detailed procedures for negotiating disputes between EMCs and CSPs, the Court concluded that

> [t]he meaning of the statute is clear. [Rutherford] cannot subject a communications service provider to a rate without first negotiating and subsequently adopting a rate or litigating disputes. Although § 62-350 in no way bars the parties from reaching an agreement through negotiation that may contemplate annual rate increases, . . . the statute cannot be construed to allow [Rutherford] to do so without first negotiating with [TWEAN].

Finally, having found Rutherford's rates for the years 2010 through 2013 unjust and unreasonable, the Business Court concluded pursuant to section 62-350 that "the parties must negotiate and adopt new rates" for those years, which "shall be applied retroactively to the date immediately following the expiration of the 90-day negotiating period for each year or the initiation of this lawsuit, whichever is earlier." The Court specifically declined to assess any damages for TWEAN because doing so "would be, in effect, setting a new rate" which it declined to do out of concern for exceeding its judicial role. Instead, the Court ordered the parties to adopt new rates for 2010 through 2013 in accordance with the reasoning outlined in its order and opinion, and further ordered that, based on those new rates, Rutherford reimburse TWEAN for any amounts it overpaid between 2010 and 2012, and that

TWC Southeast pay Rutherford the amount it owed based on the new rate adopted for 2013.

On 11 June 2014, Rutherford gave timely written notice of appeal to this Court.

II. Analysis

A. Rutherford's rates from 2010-13 were not just or reasonable under section 62-350

Rutherford first argues that the Business Court erred in its findings of fact and conclusion of law that the rates it charged TWEAN between 2010 and 2013 were not just and reasonable under section 62-350. We disagree.

The standard of review on appeal from a judgment entered after a non-jury trial like the one the Business Court conducted in this matter is "whether there is competent evidence to support the [] court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (citations and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). When the court's factual findings are supported by competent evidence, they are considered conclusive, *see id.*, while "unchallenged findings of fact are presumed to be supported by competent evidence" and thus likewise binding on appeal. *Peltzer v. Peltzer*, __ N.C. App. __, __, 732 S.E.2d 357, 360, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). However, "it is well established that facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal

light." *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 518, 722 S.E.2d 1, 11 (2012) (citation and internal quotation marks omitted). Further, conclusions of law which are mischaracterized as findings of fact will be treated on review as conclusions of law. *See, e.g.*, *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007); *see also In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) ("As a general rule . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law."). A trial court's conclusions of law are reviewed *de novo*, as are any questions of statutory interpretation. *See, e.g.*, *Dare Cnty Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997).

In the present case, Rutherford does not specifically challenge any of the order and opinion's factual findings, but instead contends that the order and opinion must be vacated in its entirety and the case remanded for a new trial because the Business Court misapprehended our General Assembly's intent in enacting section 62-350 and therefore misinterpreted and misapplied its provisions, leading to an absurd result. Rutherford offers several arguments in support of its position that the Business Court erred in its interpretation of the statute, but none of them are meritorious.

(1) The FCC Cable Rate was the only provision of Section 224 relied on at trial

First, Rutherford argues that because the statute refers to "section 224 of the Communications Act of 1934," which at the time of section 62-350's enactment in 2009

included both the FCC Cable Rate and the FCC Telecom Rate, the Business Court erred by only considering the FCC Cable Rate to determine whether Rutherford's rates were just and reasonable. However, in light of the fact that none of Rutherford's experts relied on the FCC Telecom Rate for their calculations at trial, we consider this argument to be the judicial equivalent of a red herring. While Rutherford contends that its experts utilized formulas that share the FCC Telecom Rate's approach for allocating unusable pole space, the record before us indicates that the only evidence introduced at trial regarding the specific formulas found in section 224 of the Communications Act of 1934 was TWEAN's expert Kravtin's testimony based on the FCC Cable Rate. As such, this argument is without merit.

(2) The Business Court did not presumptively adopt the FCC Cable Rate

Rutherford next argues that the Business Court erred by presumptively applying the FCC Cable Rate to determine whether its pole attachment rates were just and reasonable because the express language and legislative history of section 62-350 illustrate that our General Assembly did not intend to enact a federal standard of decision. In terms of legislative history, Rutherford emphasizes the fact that in deliberating how best to regulate pole attachment rates, our General Assembly considered statutory language that would have mandated the use of FCC rules and regulations for determining whether a rate is just and reasonable, but ultimately rejected that version of section 62-350 in favor of its current format.

Rutherford further contends that, as enacted, section 62-350's reference to "section 224 of the Communications Act of 1934" was only intended to address the admissibility of otherwise irrelevant evidence regarding federal rate-setting methods while still preserving a state law standard of decision. Indeed, Rutherford points to the use of the phrase "including without limitation" to modify the statute's reference to section 224 as proof that the General Assembly never intended for the FCC Cable Rate to presumptively apply as the standard of decision for determining whether an EMC's rates are just and reasonable.

Instead, Rutherford argues that because section 62-350 includes the terms "just," "reasonable," and "nondiscriminatory"—which are all commonly used in North Carolina statutes and case law relating to activities legislatively determined to affect a public use—and because section 62-350 falls under our State's Public Utilities Act, our General Assembly clearly intended for the Business Court to utilize state law standards in assessing pole attachment rates. Rutherford contends this is significant because unlike the FCC Cable Rate, which offers a strictly cost-based approach, the state law standard the General Assembly intended requires additional consideration of other factors, including Rutherford's organizational structure and revenue requirements as an EMC and the costs it incurs by allowing attachments to its poles, as well as distinct evidentiary standards and presumptions. *See, e.g.*, *State ex rel Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452, 467, 500 S.E.2d

693, 704 (1998); *State ex rel Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 351 N.C. 223, 245, 524 S.E.2d 10, 24 (2000). Specifically, Rutherford argues that under a state law standard: (1) the rates adopted by a legislatively designated rate-setting body are presumed to be just and reasonable; and (2) the inclusion of the term "nondiscriminatory" in section 62-350 obligates it to charge uniform class-based rates, which are judged based on their fairness to the class as a whole, rather than any specific individual member. *See, e.g.*, *Carolina Water Serv., Inc. v. Pine Knoll Shores*, 145 N.C. App. 686, 689, 551 S.E.2d 558, 560, *disc. review denied*, 354 N.C. 360, 556 S.E.2d 298 (2001); *State ex rel Utils. Comm'n v. Boren Clay Products Co.*, 48 N.C. App. 263, 270-71, 269 S.E.2d 234, 239-41, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 461 (1980); *State ex rel Corp. Comm'n v. Cannon Mfg. Co.*, 185 N.C. 17, 35, 116 S.E. 178, 189 (1923).

Proceeding from these premises, Rutherford contends that because other third-party attachers continued to pay its pole attachment rates during the years TWEAN refused, the rates should be presumed just and reasonable, and that the Business Court therefore erred in applying the FCC Cable Rate and rejecting the rate calculations proposed by Rutherford's experts based on its findings of fact, which Rutherford contends are mislabeled conclusions of law, that: (1) section 62-350's reference to section 224 indicates a "policy decision" by the General Assembly to require the use of federal standards and distinct cost apportionment methods

associated with them; (2) the Court should "look[] first to the FCC's methods . . . given [section 62-350's] express instruction for the Court to consider the FCC approach outlined in Section 224;" and (3) the General Assembly "intended" that "reliance on established FCC precedent will . . . provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions."

We agree with Rutherford that section 62-350's legislative history and its use of the phrase "including without limitation" suggests that our General Assembly did not intend for the Business Court to rely solely on the FCC Cable Rate as its standard of decision for evaluating whether a pole attachment rate is just and reasonable. Indeed, we construe the plain language of section 62-350 to indicate a broadly inclusive approach to the types of evidence the Business Court should consider in analyzing pole attachment rates. However, Rutherford's argument that the Business Court presumptively adopted the FCC Cable Rate as its standard of decision fails because it relies on selective quotations from the order and opinion that distort and ignore the context of its holding. While certain findings of fact do suggest that the Business Court viewed the FCC Cable Rate's formula for allocating costs to attachers based on the proportion of usable pole space they occupy to be a more just and reasonable method of apportionment than those provided in the formulas Rutherford's experts relied on, the order and opinion makes clear that the Court's

ultimate holding was based not on its preference for one formula over another but instead on the fact that—due to the significant errors Rutherford's experts made in calculating their proposed rates—the only competent evidence before the Court showed that the rates Rutherford charged TWEAN for the disputed years were neither just nor reasonable under the FCC Cable Rate. Stated slightly more succinctly: the problem for Rutherford was not that the Business Court refused to consider its evidence, but that it did not consider its evidence competent because the errors by Rutherford's witnesses Haire, Beacham, and Booth artificially inflated the pole attachment rates they testified would be just and reasonable. In short, the Business Court did not decide that Rutherford's witnesses were applying the wrong formulas; it concluded that they were applying them incorrectly. In the absence of any other competent evidence, it is unsurprising that the Business Court would rely on the FCC's methodology, which the express terms of section 62-350 indicate is admissible as at least some evidence of whether a pole attachment rate is just and reasonable. But that does not mean that in doing so the Business Court presumptively adopted the FCC Cable Rate as its standard of decision. Indeed, our review of the order and opinion demonstrates that, contrary to Rutherford's claims, the Business Court explicitly and repeatedly explained that its findings and conclusions were "based on the facts presented at trial in this case, and do[] not limit the Court from considering other methods of proving just and reasonable rates in

future cases that may be brought under § 62-350." As such, we conclude that the Business Court did not adopt the FCC Cable Rate as a presumptive standard of decision, nor did it err in applying it here, absent any other competent evidence, to determine Rutherford's rates for the disputed years were not just and reasonable.

As noted *supra*, Rutherford also argues that the Business Court erred by disregarding the state law standard of decision it claims our General Assembly intended, including the presumption that its rates are just and reasonable as a legislatively designated rate-making body that is obligated to charge uniform rates based on the statute's inclusion of the term "nondiscriminatory." Rutherford further contends that, in light of case law indicating the fairness of a class-based rate should be measured on a class-wide basis, *see, e.g.*, *Boren Clay Products Co.*, 48 N.C. App. at 270-71, 269 S.E.2d at 239-41, the Business Court should have presumed its rates were just and reasonable because other third-party attachers paid them. There are several reasons why these arguments fail.

On the one hand, we agree with the Business Court's conclusion that while another attacher's acceptance of Rutherford's uniform class-based rates may serve as some evidence those rates are just and reasonable, nothing in section 62-350 suggests that a rate should be presumed just and reasonable simply because it is uniform, or that the acceptance of such a rate by one attacher makes it just and reasonable as applied to all others, especially when, as here, the record demonstrates that although

TWEAN was the only attacher to stop paying, others were clearly dissatisfied with Rutherford's rates but could not afford to litigate. Like the Business Court, we read the plain language and structure of the statute to indicate that Rutherford must negotiate with each CSP that so requests, and we likewise conclude that the detailed timelines for negotiations and procedures for judicial review provided under section 62-350 would be meaningless if Rutherford "could dictate the rates and terms of attachment for every [CSP] once it reached an agreement with a single one." We are similarly unpersuaded by Rutherford's argument that the Business Court erred because TWEAN failed to prove that the uniform class-based rates Rutherford charged were unreasonable on a class-wide basis, given that Rutherford failed to prove its rates were reasonable on any basis and nothing in the record indicates that either party's rate calculations depended on any information that was uniquely specific to TWEAN. Both parties relied on Rutherford's information to calculate the costs of its poles, and Rutherford's experts based their allocation of those costs to TWEAN on Rutherford's system-wide averages, while TWEAN applied the FCC Cable Rate's allocation formula based on the one foot of usable pole space its attachments occupy. Even assuming *arguendo* that Rutherford's other third-party CSP attachers might occupy slightly more or less space on its poles than TWEAN's attachments, we conclude that because those variations would be immaterial in light

of the vast disparity between the maximum just and reasonable rate under the FCC Cable Rate and the rates Rutherford actually charged, this argument lacks merit.

On the other hand, it is difficult to discern how any of the state law presumptions Rutherford refers to could apply in this case, given that Rutherford failed to present any competent evidence that its rates were just and reasonable. The Business Court's order and opinion provides detailed findings of fact explaining how the errors Rutherford's experts made in their calculations artificially inflated its rates and why the Court did not consider them. Those findings do not require the application of legal principles and are well supported in the record by competent evidence including each witness's testimony at trial. Moreover, Rutherford does not challenge any of them or offer any argument as to how or why the state law standards it insists the Business Court should have applied would excuse self-serving mathematical errors. Therefore, these factual findings are binding on appeal. *See Peltzer*, __ N.C. App. at __, 732 S.E.2d at 360; *Everette*, 133 N.C. App. at 85, 514 S.E.2d at 525. Again, the only competent evidence before the Business Court showed that Rutherford's rates were not just or reasonable under the FCC Cable Rate, and we conclude this was sufficient to rebut the state law standards and presumptions of reasonableness Rutherford claims should have applied, as there was simply nothing to which they could attach. We therefore further conclude that Rutherford's argument

that the Business Court erred by failing to apply state law standards and presumptions lacks merit.

(3) This result is not absurd

Finally, Rutherford argues that the Business Court erred because its application of the FCC Cable Rate produced absurd results that could not have been intended by the General Assembly. While it is well established that our primary objective in construing a statute is to give effect to its legislative intent based on its plain meaning, when a literal reading of a statute "will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Freeland v. Orange Cnty.*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968).

Here, Rutherford contends the Business Court's application of the FCC Cable Rate produced absurd results with regard to both its rate levels and its aggregate pole attachment revenues. First, Rutherford complains that the Business Court's determination of its maximum just and reasonable per attachment rates of $2.68 for 2010, $2.56 for 2011, $2.57 for 2012, and $2.64 for 2013 are less than half of the per attachment rate of $5.50 that TWEAN voluntarily paid in 1999. Rutherford further asserts, without citation to any evidence in the record, that our General Assembly surely could not have intended for section 62-350 to statutorily mandate a rollback of

pole attachment rates. But Rutherford's bald assertion ignores this Court's prior holding that section 62-350 "endorses regulatory intervention to promote just and reasonable rates," *Town of Landis*, __ N.C. App. at __, 747 S.E.2d at 615, as well as the fact that before the statute's enactment in 2009, Rutherford and other EMCs were operating in what essentially amounted to an unregulated monopoly environment in which they were allowed to charge whatever exorbitant rate they wanted. We also note that Rutherford's argument mischaracterizes what the Business Court actually held. As its order and opinion makes clear, the Business Court explicitly declined to *set* a maximum just and reasonable pole attachment rate out of concern that doing so would exceed its judicial function. Instead, it held that Rutherford's rates for the years in dispute were not just or reasonable based on the only competent evidence in the record before it—TWEAN's expert Kravtin's testimony applying the FCC Cable Rate—and ordered the parties to "negotiate and adopt new rates" for the years in dispute. Thus, we conclude this argument is without merit.

Rutherford also complains that under the FCC Cable Rate, the maximum just and reasonable pole attachment rate it can charge as an EMC is far lower than the maximum rate the same formula could potentially generate for an IOU, which will result in a drastic reduction to its total revenues from pole attachments. By Rutherford's logic, this is an absurd result in part because Congress never intended for the FCC Cable Rate to apply to EMCs, which it exempted from federal regulation

when it first enacted legislation to protect the then-fledgling cable industry from monopoly pole attachment rates charged by for-profit IOUs. Nevertheless, the Business Court provided detailed factual findings explaining that the FCC Cable Rate is widely lauded for its straightforward applicability to all types of utilities. Rutherford's related argument that our General Assembly never intended for the Business Court to presumptively adopt the FCC Cable Rate as its standard of decision fails for the same reasons already discussed *supra*. Moreover, as Rutherford concedes, the disparity in the maximum rates EMCs and IOUs can charge under the FCC Cable Rate is driven entirely by the disparities in their relative costs. As an EMC organized under Chapter 117 of our General Statutes, Rutherford's costs are far lower than a typical IOU's because it is exempt from paying income taxes and receives many other special advantages in order to better serve its core mission of helping to spread electricity to rural parts of our State.

Rutherford further protests that under the FCC Cable Rate its rates will be even lower relative to IOU rates because its rural service areas have a lower average number of attaching parties per pole than IOUs that serve more densely populated areas. Essentially then, Rutherford's argument amounts to a plea for more special advantages to make up for all the special advantages that it already gets, implying that otherwise its core mission could be jeopardized by the decline in its pole attachment revenues. Rutherford made similar arguments at trial, but the Business

Court rejected them in detailed factual findings explaining that, rather than subsidizing TWEAN at Rutherford's members' expense, applying the FCC Cable Rate would still benefit Rutherford financially because the incidental costs of attachments are paid by the attachers who generate additional revenue for Rutherford by renting surplus pole space that would otherwise go unoccupied. Moreover, nothing in our review of the record indicates that Rutherford's continued financial stability is in any way dependent on its pole attachment rates or supports its insinuation that application of the FCC Cable Rate will endanger its core mission. Rutherford also argues that as an EMC, Chapter 117 of our General Statutes conveys vast discretion to its board of directors to act in the best interests of its member-owners. That may well be true, but section 62-350 demonstrates our General Assembly's intent to limit that discretion when it comes to charging pole attachment rates. While Rutherford's board of directors may no doubt be unhappy that it can no longer charge the same pole attachment rates it previously could in an unregulated monopoly environment, that alone does not mean the Business Court's narrow, detailed, and accurate application of section 62-350 produced an absurd result. We therefore conclude that this argument is without merit.

Accordingly, we hold that the Business Court did not err in concluding that Rutherford's rates for the disputed years were neither just nor reasonable under section 62-350.

B. Rutherford violated § 62-350 by unilaterally raising its rates without negotiation

Rutherford also argues that the Business Court erred by concluding that it violated TWEAN's rights under section 62-350 when it unilaterally raised TWEAN's pole attachment rates without negotiation. Specifically, Rutherford contends that given the statute's inclusion of the term "nondiscriminatory," it is obligated to charge a uniform rate to all similarly situated third-party attachers, which means it was required to invoice TWEAN at the same rate it charged other CSPs, which continued to increase during the years in dispute. Therefore, Rutherford insists that it did not violate section 62-350 when it continued to unilaterally raise TWEAN's rates without negotiation and also complains that the Business Court's interpretation of the statute renders compliance virtually impossible. We disagree.

The plain language of section 62-350 requires a utility pole owner to allow CSPs to attach to 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) (emphasis added), and further provides procedures for negotiations upon a CSP's request and mechanisms for resolving disputes arising therefrom. *Id.* § 62-350(b)-(c). Thus, as the Business Court concluded in its order and opinion, "[t]he meaning of the statute is clear. [Rutherford] cannot subject a [CSP] to a rate without first negotiating and subsequently adopting a rate or litigating disputes."

Rutherford's protests to the contrary are wholly unpersuasive. On the one hand, Rutherford insists that as an EMC organized under Chapter 117 of our General Statutes, it is authorized to adopt uniform rates for similarly situated attachers, and that section 62-350 does not purport to extinguish that authority or transfer it to either the Business Court or an objecting attacher. But this argument conveniently ignores the statute's plain language, which requires Rutherford to negotiate when requested before charging rates that are not merely uniform but also just and reasonable. On the other hand, Rutherford worries that if an EMC with multiple CSPs attached to its poles must first negotiate with every attacher that so requests before adopting a rate, compliance with section 62-350's nondiscrimination requirement will be virtually impossible. We see no reason that would prevent a pole owner from adopting temporary rates subject to true-up while negotiating rates with multiple attachers at the same time and then subsequently adopting a uniform rate that is just and reasonable as to all of them.

Finally then, absent any credible argument why we should ignore the statute's plain language, we have no trouble concluding from the procedural history of this litigation that Rutherford violated section 62-350. The record before us clearly indicates that after the parties began negotiating pursuant to section 62-350, Rutherford unilaterally raised TWEAN's pole attachment rates each year and threatened to remove TWEAN's attachments from its poles if it refused to pay the

increased rates. Rutherford attempts to argue that its actions did not violate section 62-350 because it only subjected TWEAN to invoices, but given Rutherford's failure to show that the rates reflected in these invoices were "adopted pursuant to negotiated or adjudicated agreements" as the statute's express terms require, *id.* § 62-350(a), this argument fails. Accordingly, we hold that the Business Court did not err in concluding that Rutherford violated section 62-350 when it unilaterally raised TWEAN's pole attachment rates without negotiation. Therefore, the Business Court's order and opinion is

AFFIRMED.

Judges STEELMAN and GEER concur.