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June 23, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

RE: Supplemental Ex Parte Filing of Sunesys, Inc. in RM-11303

Dear Ms. Dorch:

Sunesys, Inc. (“Sunesys”) hereby submits this filing to supplement its earlier submissions in this proceeding. As discussed below, Sunesys proposes that the Commission promptly initiate a rulemaking proceeding, and as soon as possible thereafter adopt, at the very least, the two proposals of Sunesys set forth herein.

BACKGROUND

Sunesys is participating in this proceeding because it, like numerous other providers, is greatly undermined in its ability to deploy broadband and other services because of **(1) interminable delays**, and **(2) unreasonable charges**, relating to access to utilities’ poles.

As a result, many customers who cannot otherwise receive reasonably affordable broadband services (and in many instances cannot otherwise receive broadband at all) are either unable to obtain such services, or are required to pay excessive amounts for broadband. The Commission has the authority to remedy this untenable situation, and Sunesys requests that the Commission act as promptly as possible so that the deployment of broadband can be spurred – rather than deterred.

As the Commission is aware, in this proceeding, Fibertech has requested that the Commission commence a rulemaking to adopt several proposals. Sunesys strongly supports Fibertech’s request that the Commission promptly commence a rulemaking. And, to ensure that broadband deployment can occur in the quickest possible timeframe, Sunesys requests that the Commission in that rulemaking proceeding, at the very least, adopt the following two proposals of Sunesys.

DESCRIPTION OF SUNESYS' PROPOSALS

1. Sunesys' Proposed "Six Month Rule" (To Address the Delay Problem)

- A utility would have 6 months, from the date of the utility's receipt of a pole attachment application, to issue an attachment permit.
- If the utility cannot meet the 6 month deadline using its own personnel, it must permit utility-approved contractors to perform the work so that the deadline can be met.
- Any delays caused by the attaching entity would extend the utility's deadline by the amount of the delay. (Such delays may include any failure to properly prepare the application, or any delays in payments of survey costs or for make-ready work.)

2. Sunesys' Proposed "Compliance Neutral Payment" Rule (the "CNP Rule") (To Address the Unreasonable Charges Problem)

- A utility would be permitted to charge an attaching entity for Compliance Neutral make-ready work ("CN work").
- A utility would not be permitted to charge an attaching entity for Compliance Altering make-ready work ("CA work").
- For purposes of the CNP Rule, the following definitions would apply:

- Make-ready work for an attachment is CN work (i.e., Compliance Neutral work) if

The level of compliance of the pole upon the completion of the work	IS THE <u>SAME</u> AS	The level of compliance of the pole at the time of the pole attachment application
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- Make-ready work for an attachment is CA work (i.e., Compliance Altering work) if

The level of compliance of the pole upon the completion of the work	IS <u>DIFFERENT</u> THAN	The level of compliance of the pole at the time of the pole attachment application
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- The "level of compliance" of a pole is determined by all applicable laws and generally accepted industry codes (e.g., the NESC¹).

For example, if a pole is in compliance with a certain version of the NESC prior to the attachment application, (i) CN work would include all work required for the pole to remain in compliance with that version of the NESC upon completion of the attachment, and (ii) CA work would include any work performed to place the pole into compliance with a later version of the NESC, even though such is not required by the NESC.

¹ National Electric Safety Code.

DISCUSSION REGARDING PROPOSED RULES²

1. The Six Month Rule

Without question, the Commission should initiate a rulemaking and adopt a rule specifying the maximum period of time that a utility has to issue a pole attachment permit once it receives an application. The reasons for this are straightforward. It is beyond dispute that (i) providers need access to the poles to provide their broadband and other services to customers; (ii) the completion of the pole attachments must precede end-users' use of the services; and (iii) potential customers need to know when they should reasonably expect to receive their services. A potential customer does not want to be told to sign up for a service not knowing whether it will begin receiving the service 3 months later – or 3 years later. Therefore, it is imperative that there be a reasonable level of predictability with respect to when attachments will be completed. Unfortunately, in the current environment, and specifically because there is no regulation specifying the maximum time period from date of application to date the attachment permit is issued, uncertainty with regard to the timing reigns.

The numbers speak for themselves. The disparity in the time periods for utilities to grant access to their poles is striking. Some utilities provide Sunesys access within 3 months after receiving an application, others take more than five times as long (i.e., over 15 months). Another utility takes approximately 4 years to complete the work. It does not take 15 months, let alone 4 years, to complete a pole attachment. The difference in these times (varying from 3 months to 4 years) is not a safety issue. It is not an engineering or reliability issue. It is a harm to competition issue -- and a very serious one at that.

Sunesys is not the only provider experiencing these kinds of delays and timing disparities. SegTEL, for example, receives pole attachments from one utility within 60 days of the submission of its application, but more than 500 days elapse before it receives attachments from a neighboring utility.³ These numbers simply do not add up, and as a result, a rule such as the Six Month Rule is very much needed.

In fact, in practice the Six Month Rule would be extremely generous to utilities. Fibertech has, in essence, requested that the time period between application and attachment should not exceed approximately 75 days (i.e., 30 days for the survey and 45 days for the make-ready work). While Sunesys believes that 75 days may very well be a reasonable maximum period of time,⁴ Sunesys is now proposing that a rulemaking be initiated on the Six Month Rule in an effort to promptly obtain at least *some* relief and predictability. Utilities should have absolutely no problem whatsoever meeting the Six Month Rule, and in the very rare instances when they

² The Fibertech Petition includes many proposals to alleviate the delay and cost problems. In this filing, Sunesys proposes the Six Month Rule and the CNP Rule because it believes that these two proposals have the potential for swift adoption and implementation by the Commission. Sunesys, however, still believes the Commission should also include in a rulemaking proceeding the proposals identified by Fibertech, as discussed in Sunesys' initial and reply comments, as such proposals would provide even further benefits in terms of broadband deployment.

³ See Comments of segTel, Inc. at 5.

⁴ Sunesys has supported Fibertech's proposal.

cannot, such as where there is a Katrina-type event, they can seek a waiver under the Commission's rules.⁵

In addition, while many utilities in this proceeding have expressed disagreement with Fibertech's proposal on this issue, none have proposed what the maximum period of time should be from the date of a pole attachment application to the date of issuance of an attachment permit. Notwithstanding such silence from the utilities, a maximum period is unquestionably necessary. If broadband deployment is to reach its potential, the year-long (and sometimes multi-year) delays for pole attachments must come to an end – and they must come to an end now. The Six Month Rule, while providing utilities with far more time than they ordinarily will need, should accomplish just that.

2. The CNP Rule

Under the CNP Rule, a utility would be permitted to charge an attaching entity for CN work (i.e., compliance neutral make-ready work). Make-ready work for an attachment is CN work if the level of compliance of the pole upon the completion of the work **is the same as** the level of compliance of the pole at the time of the pole attachment application.⁶ For example,

- If a pole complies with a certain version of the NESC at the time of the submission of the pole attachment application, the attaching entity would pay for all work required for the pole to remain in compliance with that version of the NESC upon completion of the attachment.
- If a pole complies with all applicable laws and generally accepted industry codes at the time of the submission of the pole attachment application, the attaching entity would pay for all work required for the pole to remain in compliance with all applicable laws and generally accepted industry codes upon completion of the attachment.

Under the CNP Rule, a utility would not, however, be permitted to charge an attaching entity for CA work (i.e., compliance altering make-ready work). Make-ready work for an attachment is CA work if the level of compliance of the pole upon the completion of the work **is different than** the level of compliance of the pole at the time of the pole attachment application. For example,

- If a pole complies with a certain version of the NESC at the time of the submission of the pole attachment application, a utility would not have the right to charge an attaching entity for the work performed to place the pole into compliance with a later version of the NESC (and the NESC would not require that the pole be in compliance with such later version).

⁵ As indicated earlier, any delays caused by the attaching entity (i.e., any failure to properly prepare the application, or any delays in payments of survey costs or for make-ready work) should extend the utility's deadline by the amount of the delay.

⁶ As noted earlier, the "level of compliance" of a pole would be determined by all applicable laws and generally accepted industry codes.

- If a pole does not comply with certain applicable laws or generally accepted industry codes at the time of the submission of the pole attachment application, a utility would not have the right to charge an attaching entity for the work performed to place the pole into compliance with those laws or generally accepted industry codes (since the utility would have had the obligation to place its pole into compliance with those applicable laws or generally accepted industry codes in any event, regardless of whether an attachment was requested).

As for CA work, the utility would have every right to perform such compliance altering make-ready work if it so chooses, but it should not be done at the expense of the attaching entity. Yet, while common sense and fundamental fairness dictate this result, utilities often seek to charge Sunesys for make-ready work under these circumstances.

The NESC expressly provides that, with limited exceptions not applicable here, existing installations that currently comply with prior editions of the NESC do not need to be modified to comply with the then current edition of the NESC.⁷ Importantly, the NESC further provides that no modifications are necessary - even if alterations are made to the existing structure (which would include additional attachments) - so long as the structure, once the attachments are made, would still be in compliance with the edition of the NESC in effect at the time the structure was initially installed.⁸ Nevertheless, even though the NESC does not require this, Baltimore Gas and Electric ("BG&E") personnel, for example, have refused to allow attachments to numerous poles unless Sunesys agrees to pay for expensive upgrades to the pole lines that will place the structures in compliance with current NESC standards. Simply put, BG&E wants Sunesys to pay for major upgrades to the pole lines that are not required under any law or under the NESC,⁹ and if Sunesys does not agree, BG&E refuses to permit the attachment. BG&E apparently views this process as a means by which to have its poles upgraded for its own benefit, but at Sunesys' expense and without legal justification for its actions. Sunesys has had similar experiences with Connectiv in Delaware when Sunesys attempted to construct in that state. The CNP Rule, if adopted, would prevent such results, which are not only inequitable and unfair, but also stifle broadband deployment, as further discussed below.¹⁰

⁷ National Electric Safety Code, §1, ¶13B(2) (2002 Edition) ("NESC").

⁸ *Id.* at §1, ¶13B(3).

⁹ The NESC rules "give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purposes, but need not do so for safety purposes." Allen L. Clapp, NESC Handbook at 4 (5th Ed. 2001). If the requirement is for the utility's purposes, the utility should pay for compliance.

¹⁰ Sunesys recognizes that the CNP Rule will not, by itself, remedy all of the unreasonable charges from utilities. The Fibertech Petition includes other important proposals, and specifically the proposal regarding boxing and extension arms, which Sunesys supports. Sunesys proposes the CNP Rule because it believes the Commission can promptly impose such a rule once a rulemaking has begun, while the Commission may need some additional time to decide on the exact parameters of any boxing and extension arms rule.

3. **Enforcement**

With respect to both the Six Month Rule and the CNP Rule, Sunesys recommends that if the Commission adopts these rules, it should ensure that sufficient enforcement mechanisms are included so that utilities do not violate or ignore the rules. Sunesys believes the exact nature of the enforcement mechanisms should be determined during the rulemaking proceeding.

THE PROPOSED RULES ARE NECESSARY TO HELP ACHIEVE FULL BROADBAND DEPLOYMENT

1. **Broadband Deployment**

Sunesys' customers include large commercial, non-profit, and government entities that are utilizing a wide variety of broadband services. An illustrative example of end-users greatly benefiting from Sunesys' network are public schools and libraries. Among Sunesys' customers are approximately 60 school districts, comprising more than 700 schools. Sunesys provides these school districts and schools with gigabit connectivity at a reasonable price, enabling them to receive the following types of services:

(a) **Very High Speed Internet Access**

- Used by students to perform classroom assignments
- Used by students to conduct research
- Enables students to learn how to use the Internet (many of the students do not have Internet access at home)
- Extremely high speeds enable students to accomplish much more on the Internet in a far shorter period of time, permitting more opportunity for other learning as well

(b) **Distance Learning**

- Students can communicate with teachers (and ask questions) either through a microphone or by placing questions on whiteboard, and distance learning is just as interactive for students and teachers as ordinary classroom teaching
- Enables all schools in a district to benefit from the teaching expertise of one teacher, or a few teachers, in a specialized area (e.g., if a school district has only one or two Spanish teachers, students at every school in the school district can still take Spanish, through distance learning)
- Enables school districts to hire specialists in more areas of expertise (since fewer specialists in each expertise are needed)

- Enables students to take courses even where there are too few children at their school to justify offering the course at that location (they can take the course through distance learning), such as where students are very advanced, or, on the other hand, far behind
- Enables children to learn from teachers from other states or countries to gain additional perspectives on a topic (e.g., students learned from Israeli teachers after September 11th attacks how Israel has dealt with terrorist attacks)

(c) Security Cameras Used by School Districts

- Allows a school district to monitor every school from one central location in the school district, and place all of the film on a hard drive
- Easy to search film for whatever the school district needs to locate on it
- Enables a school district to ascertain when there are intruders outside or within a school
- Enables a school district to determine who is committing, or has committed, vandalism

(d) Video Services (Streaming Video)

- Allows a school district to consolidate audio/video in single location
- Multiple classrooms can watch same movie at same time and all classes in a school can be taught at same pace without the need to have multiple copies of movies

(e) Voice Over IP

- Creates substantial costs savings for administration and schools (even if PBX are still used, there are tremendous cost savings)
- Allows the entire school district to be turned into an intercom-type system

(f) Record Centralization

- Enables centralization of records at school district level
- Tremendous costs savings (far less equipment is needed), and eases administrative burdens on schools

2. **Full Broadband Deployment is Being Thwarted by the Actions of Utilities**

The impact of the utilities' actions on full broadband deployment is extremely significant, and the limitations on Sunesys with regard to the schools and libraries it can serve provides a clear illustration of this point. More than one hundred of the schools served by Sunesys' network are

located in rural areas, and many of the others are disadvantaged schools, some of which are under receivership. Without Sunesys' network, few, if any, of the schools and school districts would be receiving the tremendous benefits that they are currently experiencing with broadband.

The vast majority of the schools and school districts receiving these broadband services over Sunesys' network are located in Pennsylvania. Sunesys has only a small presence in Maryland and New Jersey and does not have any physical networks in Delaware. The reason that Sunesys is serving a significant volume of schools and school districts in Pennsylvania and not in Maryland, New Jersey and Delaware is simple. In Pennsylvania, utilities provide Sunesys with access to utility poles in a timely manner at a reasonable price – and in stark contrast, in Maryland, New Jersey and Delaware, they generally do not.

It has been Sunesys' experience that in Maryland and Delaware, utilities often demand that in consideration for agreeing to attachments, Sunesys must fully fund pole upgrades that are not required by law or generally accepted industry codes. As a result, Sunesys often cannot offer its facilities to schools and school districts in these states in a cost-effective manner.

In addition, the delays in receiving access to the poles in those states and New Jersey are often interminable. As an initial matter, in these states utilities often fail to respond to Sunesys' pole attachment applications for approximately six months or more. Then, once the parties have agreed to move forward with the requested attachments, Sunesys frequently has no idea how long the utility will take to perform the make-ready work after Sunesys has paid for such work – and the time period is often extremely long. In fact, as previously discussed, in many instances the delays between the submission of pole attachment applications and performing make-ready work have exceeded fifteen months, and in the case of PSE&G in New Jersey were in excess of 4 years. These delays further eliminate any realistic possibility of Sunesys providing its network to many schools and school districts in Maryland, New Jersey and Delaware.

Unfortunately, the bottom line is that school districts and schools in a number of states are not receiving tremendous broadband services for one reason, and one reason only: Because of the actions of utilities described above, Sunesys cannot receive access to utility poles in a timely manner at a reasonable price. Moreover, these issues are not related simply to Sunesys or these few states. Sunesys will soon begin providing its gigabit connectivity in several additional states and plans to continue to expand into other states. Whether schools and school districts in those other states will receive these broadband services will depend on whether utilities charge reasonable prices for access and provide such access without exorbitant delays. In addition, there are many other commenters in this proceeding, including Fibertech, whose services will also continue to be undermined until a few changes to the Commission rules are implemented, such as the Six Month Rule and the CNP Rule.

For the foregoing reasons, Sunesys submits that the Commission should promptly commence a rulemaking to consider adopting as soon as possible, at a minimum, the Six Month Rule and the CNP Rule.

Marlene H. Dortch, Secretary
June 23, 2006
Page 9

If you have any questions, please contact the undersigned.

Respectfully submitted,

A handwritten signature in brown ink that reads "Alan G. Fishel". The signature is written in a cursive style with a large initial "A" and "F".

Jeffrey E. Rummel
Alan G. Fishel

Attorneys for Sunesys, Inc.