

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)	WC Docket No. 07-245
In the Matter of)	
Implementation of Section 224 of the Act;)	RM-11293
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments)	RM-11303
_____)	

**COMMENTS OF SUNESYS, LLC REGARDING RATES,
TERMS AND CONDITIONS OF ACCESS TO UTILITY POLES**

Respectfully submitted,

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SUMMARY

In light of eleven indisputable facts, which are set forth below, the Commission should adopt rules to ensure timely access to utility poles and prevent the continued imposition of unreasonable and excessive pole attachment charges.

Indisputable facts

1. Access to Utility Poles by Providers of Broadband and Telecommunications Services is Essential to the Deployment of Such Services.
2. Utilities Have No Incentive to Facilitate Such Access, and in Many Instances They Even Have Incentives to Impede Such Access.
3. Pole Attachment Agreements Are Not Negotiated – They are “Take it or Leave it” Form Agreements Prepared by Utilities.
4. Timely Access to Utility Poles is Critical to the Deployment of Broadband and Telecommunications Services.
5. Utilities Frequently Fail to Even Respond At All to Pole Attachment Applications for Many Months.
6. Utilities Frequently Fail to Complete Make-Ready Work Until More than a Year after Receipt of a Pole Attachment Application, and They Also Often Refuse to Provide Any Indication of When Such Work Will be Completed.
7. Unreasonable Pole Attachment Charges Create Significant Barriers to Competition.
8. Utilities Often Greatly Overcharge Attachers, By Charging for Work that is Either Unnecessary or Should be Paid for by the Utility.
9. Inordinate Delays and Unreasonable Charges Concerning Pole Attachments Are Undermining Broadband Deployment, and Causing Broadband Providers to Avoid Certain Markets.
10. Inordinate Delays and Exorbitant Charges for Pole Attachments are Not Safety, Engineering or Reliability Issues -- They Are Harm to Competition Issues.
11. The Complaint Process Does Not Adequately Resolve the Delay and Cost Issues Involved – It Only Adds to the Delays and Costs Incurred by Providers.

To address the inordinate delays in the process caused by many utilities, Sunesys recommends that the Commission adopt Sunesys’ proposed “Six Month Rule.” Under that rule, 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.

To address the excessive charges problem, Sunesys recommends that the Commission adopt Sunesys’ proposed “Compliance Neutral Payment” (“CNP”) Rule. Under that rule,

- 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 standards (e.g., the National Electric Safety Code “NESC”).*

The Commission, which has steadfastly supported the deployment of broadband in many other proceedings, should take action here, consistent with Sunesys’ recommendations, to continue to promote broadband deployment and competition.

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**COMMENTS OF SUNESYS, LLC
REGARDING RATES, TERMS AND CONDITIONS
OF ACCESS TO UTILITY POLES**

Sunesys, LLC (“Sunesys”), by undersigned counsel, hereby submits these Comments in the above-captioned matter.¹ As explained herein, in response to the Commission’s request for comment as to the rates, terms and conditions of access, Sunesys files these Comments in support of the adoption of rules that will ensure timely access to utility poles and prevent the continued imposition of unreasonable and excessive pole attachment charges.

Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services. Sunesys’ customers include large commercial, non-profit, and government entities. As a competitive service provider certified to provide telecommunications services in numerous states, Sunesys is intimately familiar with the statutes and regulations governing pole attachments, and the practices of utilities in

¹ Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, FCC 07-187 (2007) (the “NPRM”).

response to Sunesys' requests for timely, reasonable and nondiscriminatory access to the poles.

I. Eleven Indisputable Facts Absolutely Warrant Commission Action Here

In the Local Competition Order released in 1996, the Commission recognized that because it was not then establishing a comprehensive regulatory regime regarding pole attachments, such approach might result in more disputes between parties than would otherwise arise.² The Commission further cautioned that it would “monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition....”³

Without a doubt, the time for more specific rules has come. Broadband deployment must continue to be spurred and protected by the Commission – not deterred and delayed by utility intransigence and overcharging. Accordingly, the Commission should, at a minimum, adopt rules consistent with the recommendations discussed in Sections II and III herein.

Sunesys has identified eleven indisputable facts that provide compelling support for Commission action in this proceeding, which facts are listed on the following page.

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499, 16067-68 (¶ 1143) (1996) (“Local Competition Order”).

³ Id.; NPRM, ¶ 9.

The Eleven Indisputable Facts Supporting Commission Action

The following indisputable facts provide compelling support for Commission action in this proceeding:

1. Access to Utility Poles by Providers of Broadband and Telecommunications Services is Essential to the Deployment of Such Services.
2. Utilities Have No Incentive to Facilitate Such Access, and in Many Instances They Even Have Incentives to Impede Such Access.
3. Pole Attachment Agreements Are Not Negotiated – They are “Take it or Leave it” Form Agreements Prepared by Utilities.
4. Timely Access to Utility Poles is Critical to the Deployment of Broadband and Telecommunications Services.
5. Utilities Frequently Fail to Even Respond At All to Pole Attachment Applications for Many Months.
6. Utilities Frequently Fail to Complete Make-Ready Work Until More than a Year after Receipt of a Pole Attachment Application, and They Also Often Refuse to Provide Any Indication of When Such Work Will be Completed.
7. Unreasonable Pole Attachment Charges Create Significant Barriers to Competition.
8. Utilities Often Greatly Overcharge Attachers, By Charging for Work that is Either Unnecessary or Should be Paid for by the Utility.
9. Inordinate Delays and Unreasonable Charges Concerning Pole Attachments Are Undermining Broadband Deployment, and Causing Broadband Providers to Avoid Certain Markets.
10. Inordinate Delays and Exorbitant Charges for Pole Attachments are Not Safety, Engineering or Reliability Issues -- They Are Harm to Competition Issues.
11. The Complaint Process Does Not Adequately Resolve the Delay and Cost Issues Involved – It Only Adds to the Delays and Costs Incurred by Providers.

These facts are discussed in greater detail below.

Indisputable Fact #1: Access to Utility Poles by Providers of Broadband and Telecommunications Services is Essential to the Deployment of Such Services.

Even utilities cannot and do not dispute that broadband providers and telecommunications providers need access to utility poles in order to provide broadband and telecommunications services. Generally, without such access, broadband and other services cannot be provided.

Indisputable Fact #2: Utilities Have No Incentive to Facilitate Such Access, and in Many Instances They Even Have Incentives to Impede Such Access.

As the Commission and Congress have both recognized, the parties in a pole attachment negotiation do not have equal bargaining positions.⁴ In fact, the Commission has found that a utility's position in a pole attachment negotiation is virtually indistinguishable from that of an incumbent local exchange carrier ("ILEC") in an interconnection negotiation, where an ILEC has "scant, if any, economic incentive to reach agreement" regarding interconnection since the competitive local exchange carrier will use those rights to compete with the ILEC.⁵ Now that utilities are also permitted to provide broadband and telecommunications services, and are therefore competitors of prospective attachers, utilities actually have an incentive to impede such attachments. It is axiomatic that companies generally do not have any incentive to help facilitate their competitors' service; in fact, quite the opposite is true.

⁴ Implementation of Section 703(e) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 12 FCC Rcd. 11,725, 11731 (¶ 12) (1997) ("NPRM to Implement Section 703"); Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6,777, 6784, 6794 (¶¶11, 31) (1998) ("1998 Order Implementing Section 703").

⁵ 1998 Order Implementing Section 703, 13 FCC Rcd. at 6789 (¶21).

For example, Sunesys signed a contract with a customer to provide service in Public Service Electric and Gas Company (“PSE&G”) territory, with an anticipated delivery date to the customer of nine months. PSE&G failed to perform the make-ready work necessary to allow Sunesys to construct its plant on a timely basis, claiming that it lacked sufficient resources to meet the requested timetable. When Sunesys could not meet the customer’s delivery date nor provide a reasonable estimate of a later delivery date, because of PSE&G’s refusal to provide timetables or perform the work, the customer contacted PSE&G directly to attempt to obtain that information. PSE&G instead contracted directly with the customer and, using PSE&G crews, quickly constructed the necessary fiber in the power space and leased it to the customer directly. PSE&G apparently had no trouble finding the resources to support the customer once it took over the account – which Sunesys had lost due to PSE&G’s dilatory action. After completing this construction, PSE&G finally performed the then unnecessary make-ready work for Sunesys – leaving Sunesys with a large bill but no customer.

Indisputable Fact #3: Pole Attachment Agreements Are Not Negotiated – They are “Take it or Leave it” Form Agreements Prepared by Utilities.

Some utilities claim that the Commission need not implement any rules concerning pole attachments at this time because the proper means of dealing with all pole attachment issues should be through negotiation of the terms of the applicable agreement – i.e., a negotiated agreement will effectively resolve any issues between the parties. There is one critical problem with that argument – there are no negotiations. Rather, utilities (who as mentioned above have no incentive, and often a disincentive, to enter into such agreements) provide form “take it or leave it” agreements to proposed

attachers. All the leverage is with the utility and none is with the broadband or telecommunications provider who is requesting attachment to the utility's poles.

Indisputable Fact #4: Timely Access to Utility Poles is Critical to the Deployment of Broadband and Telecommunications Services.

The Commission has recognized the critical importance of timely access to utility poles, ducts, conduits and rights-of-way. As the Commission has found,

We agree with attaching entities that time is critical in establishing the rate, terms and conditions for attaching. Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.⁶

The Commission has made it clear that lengthy delays in resolving access issues are “not ... conducive to a pro-competitive, deregulatory environment” and can “delay a telecommunications carrier’s ability to provide service and unnecessar[ily] obstruct the process.”⁷ Courts similarly have recognized that timely access is critical: “The utility is statutorily required to grant prompt, nondiscriminatory access and may not erect unreasonable barriers or engage in unreasonable delaying tactics.”⁸

Indisputable Fact #5: Utilities Frequently Fail to Even Respond At All to Pole Attachment Applications for Many Months.

As commenters have described, numerous utilities fail to even respond to pole attachment applications for many months. In fact, utilities frequently fail to respond to Sunesys’ pole attachment applications for approximately six months or more. For example, Sunesys filed three applications with BG&E in May 2004, and did not receive

⁶ 1998 Order Implementing Section 703, 13 FCC Rcd. at 6787-88 (¶17).

⁷ *Id.* at 6788 (¶17).

⁸ Southern Company, 313 F.3d at 583.

any response from BG&E until February 2005 – nearly nine months later. In another state, Sunesys filed its applications in March 2005 and heard nothing from the utility until almost 6 months later.

Indisputable Fact #6: Utilities Frequently Fail to Complete Make-Ready Work Until More than a Year after Receipt of a Pole Attachment Application, and They Also Often Refuse to Provide Any Indication of When Such Work Will be Completed.

As a result of utilities' dilatory conduct in processing pole attachment applications and performing make-ready work, in many instances the delays between the submission of pole attachment applications by Sunesys and the grant of the pole attachment permits have exceeded fifteen months. In a number of instances in the case of PSE&G, such delays were in excess of four years. Sunesys also experienced tremendous delays by Connectiv in New Jersey, where it required more than sixteen months for Connectiv to perform the make-ready necessary to permit construction of a wide area network for a New Jersey public school system in Connectiv's New Jersey territory, thus delaying the school system's broadband initiative for almost a full year.

Other providers have also recounted the tremendous delays they have encountered. segTEL, Inc., for example, has discussed how it has submitted applications that have been pending with the utility for over 500 days for as few as 40 pole attachments.⁹ NextG Networks, Inc. has similarly confirmed that it has had significant "difficulties with pole owners on issues of survey and make-ready time periods" and provided specific examples of significant delays experienced with respect to utility performance of make ready work, as well as utilities simply not responding to requests

⁹ Comments of segTEL, Inc., p. 5 (Filed in RM-11303).

for access.¹⁰ Further, Virtual Hipster Corporation described in particularity its problems relating to “unjust delays in negotiating terms and conditions of access.”¹¹

To make matters even worse, it is often impossible to learn from a utility when the make-ready work will be completed. Questions regarding scheduling are met with silence. Therefore, it is impossible for Sunesys to manage its customers expectations, leading to further lost business opportunities.

Indisputable Fact #7: Unreasonable Pole Attachment Charges Create Significant Barriers to Competition.

It is obvious that unreasonable charges for pole attachments impede broadband deployment. And, in fact, the Commission has previously concluded that unreasonable charges for pole attachments will create significant barriers to competition.¹²

Indisputable Fact #8: Utilities Often Greatly Overcharge Attachers, By Charging for Work that is Either Unnecessary or Should be Paid for by the Utility.

Utilities often seek to charge attachers for work that is either (i) unnecessary or (ii) should be paid for by the utility. As for the former, work is unnecessary if it is not necessary to keep the pole in compliance with law or generally accepted industry standards. In that instance, a utility, of course, has the right to perform such additional work if it wishes, but it should not be able to charge the attacher for such optional work, which is neither required by law or generally accepted industry standards.

As for the latter, if a pole is not in compliance with applicable laws or generally accepted industry standards prior to the attachment, the utility – and not the attacher – should pay for work performed to place the pole in compliance with applicable laws and

¹⁰ Comments of NextG Networks, Inc., p. 5-6 (Filed in RM-11303).

¹¹ Comments of Virtual Hipster Corporation, p. 4-8 (Filed in RM-11303).

¹² NPRM to Implement Section 703, 12 FCC Rcd. at 11731 (¶12).

standards. The attacher should only pay for the work performed to place the pole in the same level of compliance (with respect to applicable laws and industry standards) as it was in prior to the request.

Unfortunately, utilities do not follow these eminently reasonable, pro-competitive, practices. For example, Baltimore Gas and Electric (“BG&E”) personnel have refused to allow attachments to numerous poles unless Sunesys agrees to pay for expensive upgrades to the pole lines that that are not required under any law or industry standards, 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.

Indisputable Fact #9: Inordinate Delays and Unreasonable Charges Concerning Pole Attachments Are Undermining Broadband Deployment and Causing Broadband Providers to Avoid Certain Markets.

Sunesys has ceased attempts to enter the market in Delaware as a result of Connectiv’s high costs and lengthy delays for make-ready experienced when Sunesys attempted to provide a customer with a fiber optic connection between that customer’s facilities in Pennsylvania and Delaware. Although only 1-1/2 miles of that connection was located within Connectiv’s territory, the make-ready costs required and delays by Connectiv in granting pole licenses were so significant that Sunesys was forced to license another carrier’s fiber to service the customer, rather than continue to attempt to obtain access to the poles to construct its own facilities. In light of these difficulties, Sunesys has determined that it would not be economically feasible to compete in Delaware.

Similarly, Sunesys has abandoned efforts to provide wide area network services to an interested school district in Maryland because the excessive make-ready charges demanded by BG&E rendered the project economically unfeasible, despite the obvious value to the school district of dedicated broadband services, which the Commission supports as a matter of regulatory policy and subsidizes through the Universal Service Fund. In that instance, BG&E, without legal justification, sought to require Sunesys to fund a replacement of a substantial number of poles on the pole line as a condition of permitting Sunesys to make its attachments.

Moreover, numerous other detailed comments have previously been submitted to the Commission demonstrating the great harms that are occurring from inordinate delays and excessive charges for pole attachments, including those comments submitted in RM-11303 from Fibertech Networks, Sigecom, McLeod Telecommunications Services, Indiana Fiber Works, segTEL, Virtual Hipster, Tropos Networks, Time Warner Telecom, and T-Mobile USA.

Indisputable Fact #10: Inordinate Delays and Exorbitant Charges for Pole Attachments are Not Safety, Engineering or Reliability Issues – They Are Harm to Competition Issues.

If safety, engineering or reliability issues prevented utilities from performing make-ready work in a reasonably prompt manner, or charging reasonable fees, all utilities would be unable to perform make-ready work in a timely fashion or charge reasonable rates. But, as Sunesys has experienced, some utilities respond to pole attachment requests and perform the make-ready work promptly (all within about 90 days after application), and do not charge exorbitant pole attachment fees. Indeed,

make-ready work can be done in a reasonable period of time for a reasonable charge, without compromising safety or reliability at all.

Nevertheless, many of the utilities in this proceeding have argued that safety and reliability issues warrant the Commission staying on the sidelines rather than helping promote broadband deployment. This Commission, however, has been steadfast in its support for broadband deployment, and ensuring that such deployment is not derailed. And one thing is certain here: a pole owner's multi-year delay in providing attachments is not a safety, engineering or reliability issue. Rather, it is a harm-to-competition issue. Such delays by the utilities delay – if not completely derail – broadband deployment. In addition, there are no safety, engineering or reliability issues that necessitate charging excessive rates, nor has any utility even tried to claim to the contrary.

Indisputable Fact #11: The Complaint Process Does Not Adequately Resolve the Delay and Cost Issues Involved – It Only Adds to the Delays and Costs Incurred by Providers.

As discussed above, broadband deployment is being greatly derailed due to the inordinate delays and excessive charges in connection with pole attachments. Ironically, utilities claim that those problems can be resolved through providers filing complaints every time a utility fails to comply with the law. The problem with this approach is undeniable. Complaint proceedings further add to a provider's delay and costs, as they take many months to resolve and involve significant fees. To say the least, case-by-case resolution of every pole attachment dispute will only stifle competition. Only if the Commission adopts new rules which end the deep-rooted, ongoing abuses, and minimize the disputes, will broadband competition have an opportunity to fully develop and grow.

II. Sunesys' Proposals (Brief Description)

Sunesys hereby submits two proposals that it urges the Commission to adopt, one of which addresses the interminable delay problem and the other of which addresses the excessive charges problem. They are briefly summarized in the following pages, and discussed in more detail in Section III. The first proposal, referred to as Sunesys' proposed "Six Month Rule," is intended to address the delay problem discussed at length above. The second proposal, referred to as Sunesys' proposed "Compliance Neutral Payment Rule," is intended to address the unreasonable charges problem also discussed above.

In addition, Sunesys proposes 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 that if a utility violates these rules an attacher should have the right to obtain emergency injunctive relief as well as reimbursement of the attachers' legal fees and other costs arising out of such violation.

These proposals are briefly summarized in the following pages, and discussed in more detail in Section III.

A. 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 consistent with Sunesys' proposals herein.)

B. 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 standards (e.g., the National Electric Safety Code "NESC").

III. Sunesys' Proposals in More Detail

A. The Six Month Rule (To Address the Delay Problem)

Without question, the Commission should 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.¹³ 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, Sunesys proposes that, at the very least, the Commission adopt the Six Month Rule to obtain at least some relief and predictability for providers. Utilities should have absolutely no problem whatsoever meeting the Six Month Rule, and in the very rare instances when they cannot, such as where there is a Katrina-type event, they can seek a waiver under the Commission's rules.¹⁴

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.

¹³ See Comments of segTel, Inc. at 5 (Filed in RM-11303).

¹⁴ As indicated earlier, any delays caused by the attaching entity should extend the utility's deadline by the amount of the delay.

B. The CNP Rule (To Address the Unreasonable Charges Problem)

1. Utilities Should be Permitted to Charge for CN work

Under Sunesys' proposed CNP Rule, a utility would be permitted to charge an attaching entity for CN work (i.e., compliance neutral make-ready work).

Question:

When is Make-Ready Work "CN work"
that Would be Subject to Utility Charges?

Answer:

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.¹⁵

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 standards 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 standards upon completion of the attachment.

2. Utilities Should Not be Permitted to Charge for CA work

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).

¹⁵ As noted earlier, the "level of compliance" of a pole would be determined by all applicable laws and generally accepted industry standards.

Question:

When is Make-Ready Work “CA work”
that Would Not be Subject to Utility Charges?

Answer:

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).
- If a pole does not comply with certain applicable laws or generally accepted industry standards 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 standards (since the utility would have had the obligation to place its pole into compliance with those applicable laws or generally accepted industry standards 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.

C. 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 that if a utility violates these rules an attacher should have the right to obtain

emergency injunctive relief as well as reimbursement of the attachers' legal fees and other costs arising out of such violation.

IV. The Proposed Rules Are Necessary To Help Achieve Full Deployment

A. 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 115 school districts, comprising more than 1,000 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

**B. 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 provide a clear illustration of this point. A significant number 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 and California. 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 California, and not in Maryland, New Jersey and Delaware is simple. In Pennsylvania and California, 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 standards. 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

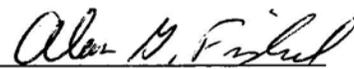
Commission should promptly adopt, at a minimum, the Six Month Rule and the CNP Rule.

V. Conclusion

The Commission's concerns regarding the pole attachment rules have come to pass, namely that the rules adopted in the Local Competition Order have proven to not sufficiently facilitate access and develop competition. Accordingly, for the foregoing reasons, the Commission should adopt the proposals set forth in these comments.

Respectfully submitted,

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