

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

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

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

Respectfully submitted,

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SUMMARY

The Commission should hold that all broadband providers must pay the same rate for pole attachments so as to avoid discriminating in favor of certain broadband providers over other providers. That is, the Commission should treat like providers in a like manner. The Commission should also rule that all broadband providers (regardless of what other services they also provide) shall pay the rate that cable operators who also provide broadband service currently pay (the “Predominant Broadband Rate”) rather than the rate currently paid by telecommunications carriers (the “High Broadband Rate”) for the following reasons:

- The Commission should not impose the High Broadband Rate, which would effectively be a new broadband tax (the Commission should seek to encourage -- not discourage -- broadband deployment).
- The Predominant Broadband Rate is already the rate most often charged throughout the country (the Commission would be dramatically altering the broadband market if it did not adopt the Predominant Broadband Rate as the rate for all broadband providers).
- The Predominant Broadband Rate is not a subsidy of provider’s expenses (as the courts, the Commission, and state public utility commissions, have found).
- The majority of states regulating attachment rates use the Predominant Broadband Rate.
- The methodology used for the Predominant Broadband Rate is consistent with that used for other types of space rentals.
- The Predominant Broadband Rate provides needed clarity whereas the High Broadband Rate would add to the confusion and uncertainty with respect to rates.
- Providers pay the proper amount for unusable space under the Predominant Broadband Rate.

In addition to addressing the ongoing imposition of excessive rental rates for pole attachments, the Commission needs to also address excessive and inappropriate utility charges for make-ready and other up-front work. The only way to prevent these unreasonable charges, which deter broadband deployment, is for the Commission to adopt a clear rule. Under Sunesys’ proposed rule, the “Compliance Neutral Payment Rule” or “CNP Rule”, a utility would be permitted to charge an attacher for compliance neutral work (“CN work”) but not compliance altering (“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 Commission also should not permit utilities to undermine broadband deployment by creating their own pole attachment requirements that go over and beyond those issued by federal, state and local authorities or required under generally accepted industry standards.

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.

In addition, the Commission should not limit providers' rights to challenge unlawful pole attachment agreements. Without such rights, providers would be left with a Hobson's choice: either agree to unreasonable terms that may make their service unprofitable or the risks involved untenable, or forego the attachment for the foreseeable future and risk losing the customer altogether. Finally, the Commission should hold off enhancing the penalties for unauthorized attachments, as placing a deadline for issuing permits may eliminate the need to increase penalties.

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Sunesys, LLC (“Sunesys”),¹ by undersigned counsel, hereby submits these Reply Comments in the above-captioned matter.² The Commission has received thousands of pages of comments on these issues, but it should not overlook the bottom line, which is this: the rules proposed by Sunesys are pro-broadband and will speed up broadband deployment and make it more affordable for everyone. Conversely, utilities’ comments and proposals are anti-broadband and, if adopted, would constitute a giant step backwards. The Commission has done too much good, and served the public too well, with respect to broadband deployment to go in the other direction now.

¹ Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services.
² *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”).

I. The Pole Attachment Rate for All Broadband Service Providers Should Equal the Current Broadband Pole Attachment Rate for Cable Operators

A. All Broadband Service Providers Should Pay the Same Rate for Pole Attachments

Commenters generally agree that all broadband service providers³ should pay the same pole attachment rates to utilities.⁴ There is no justification for imposing different pole attachment rates on broadband providers based on whether the other service they provide is cable or telecommunications, and such discrimination undeniably skews the marketplace. Given that there is essentially no disagreement concerning this issue in the record, and given that there is no reason to discriminate in favor of certain broadband providers over other broadband providers, the Commission should require that all broadband providers pay the same rate for attachments. In doing so, the Commission will be acting in a manner consistent with its long-standing, and well-reasoned, precedent of treating providers of like services in a like manner.⁵

B. Broadband Service Providers Should Pay the Pole Attachment Broadband Rate that Cable Operators Currently Pay

While commenters agree that the pole attachment rates should be the same for all broadband service providers, they disagree as to what the rate should be.

³ References to broadband service providers in this filing should not be construed to refer to incumbent local exchange carriers. Incumbent local exchange carriers are in a different position than other providers with regard to pole attachments and may be treated differently with respect to rental rates for numerous reasons, including because they do not ordinarily pay for up-front charges such as make-ready work.

⁴ See, e.g., Comments of the Utilities Telecom Council, p. 20 (Filed in WC Docket No. 07-245) (“UTC Comments”); Comments of Time Warner Telecom Inc., One Communications Corp. and Comptel, p. 3 (Filed in WC Docket No. 07-245) (“TWTC Comments”).

⁵ See, e.g., *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶¶ 1, 3, 16 n.44 & 45 (also noting how regulat[ing] like services in a similar manner” promotes market-based investment decisions, not ones driven by regulatory disparities).

But the resolution of this issue is easy. Broadband providers (regardless of whether the other service they provide is telecommunications or cable) should pay the rate that cable operators who also provide broadband service currently pay (the “Predominant Broadband Rate”) rather than the rate currently paid by telecommunications carriers (the “High Broadband Rate”).⁶ The following seven reasons, each of which are discussed in more detail below, support this inescapable conclusion:

1. The Commission should not impose what would effectively be a new broadband tax.
2. The Predominant Broadband Rate is already the rate most often charged throughout the country.
3. The Predominant Broadband Rate is not a subsidy of provider’s expenses.
4. The majority of states regulating pole attachment rates use the Predominant Broadband Rate.
5. The methodology used for the Predominant Broadband Rate is consistent with that used for other types of space rentals.
6. The Predominant Broadband Rate provides needed clarity whereas the High Broadband Rate would add to the confusion and uncertainty with respect to rates.
7. Providers pay the proper amount for unusable space under the Predominant Broadband Rate.

1. **The Commission Should Not Impose What Would Effectively be a New Broadband Tax.**

For several years, the Commission has steadfastly maintained that its highest priority is to encourage the deployment of affordable broadband services to all Americans, so that everyone -- and not just some consumers -- have the opportunity

⁶ Some utilities, incredibly, request that the rate should even exceed the High Broadband Rate, but such an approach should be rejected for all the reasons discussed below.

to receive all of the tremendous benefits that broadband offers.⁷ Yet, if the Commission were to require that all broadband providers pay the High Broadband Rate, the pole attachment rental rates paid by cable operators who also provide broadband service would rise dramatically, and in fact, by several hundred percent in most instances.⁸ This would effectively constitute a new “Broadband Tax,” leading to far more expensive and thus significantly more restricted deployment of broadband services. Consumers, in turn, would suffer greatly, in the form of higher broadband bills and, in many instances, loss of broadband service. The Commission has acted on numerous occasions to encourage the deployment of affordable broadband service.⁹ **To hold now, as the utilities recommend, that the broadband rate for pole attachments should be the High Broadband Rate would be a giant step backwards.**

2. **The Predominant Broadband Rate is Currently the Rate Most Often Charged Throughout the Country.**

If the Commission were to require that the broadband rate exceed the current Predominant Broadband Rate, not only would broadband rates increase greatly, but this development would negatively impact the vast majority of consumers. According to the Utilities Telecom Council, approximately 89% of pole attachments are

⁷ For example, in Chairman Martin’s written statement to the United States Senate Committee on Commerce, Science & Transportation, Chairman Martin commented: “I will continue to make broadband deployment the Commission’s top priority. As I previously touched upon, the ability to share increasing amounts of information – at greater and greater speeds – increases productivity, facilitates interstate commerce, and encourages innovation.” Written Statement of the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, Before the Committee on Commerce, Science & Transportation, U.S. Senate, February 1, 2007, p. 6.

⁸ *See, e.g.*, Comments of National Cable Telecommunications Association, pp. 18-19 (Filed in WC Docket No. 07-245) (“NCTA Comments”).

⁹ *See, e.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, FCC 07-30, WT Docket No. 07-53 (2007).

invoiced at the Predominant Broadband Rate.¹⁰ Only 11% are currently invoiced at the High Broadband Rate.¹¹ Accordingly, if the Commission requires that all broadband providers pay the Predominant Broadband Rate, as Sunesys recommends, no end-user broadband rates will increase and only 11% would change at all (and they would decrease). On the other hand, if the Commission requires that all broadband providers pay the High Broadband Rate (or any rate exceeding the Predominant Broadband Rate), 89% of the payments for broadband attachments would increase tremendously.¹² That is, a ruling adopting the utilities' proposals would result in a dramatic shake-up of the broadband market with higher prices and significantly restricted broadband deployment, to the tremendous detriment of consumers, telecommunications providers, and everyone else, other than, of course, the utilities themselves who would reap a windfall.

3. The Predominant Broadband Rate is Not a Subsidy of Providers' Expenses.

Utilities' comments gloss over the critical fact that, wholly apart from rental rates, utilities already charge attachers in advance for make-ready work and all other up-front services that generally reflect their incremental costs of adding an attachment.¹³ Thus, the separate rental charge for use of a pole is considerably greater than any additional incremental costs (if there are any) not already covered by make-ready charges and other up-front fees. Accordingly, to say the least, utilities are not subsidizing communications providers' expenses in connection with pole attachments,

¹⁰ UTC Comments, pp. 8-9.

¹¹ *Id.* In fact, UTC admits that the High Broadband Rate "has become more myth than reality, because relatively few attachments are subject to" the High Broadband Rate.

¹² In fact, amazingly, many utilities recommend that the Commission permit utilities to charge rates above even the High Broadband Rate, and thus under their proposals 100% of the pole attachment rates would increase significantly, which would even further undermine broadband deployment.

¹³ Utilities, of course, include the capital cost of the pole itself in their rate base.

and, if anything, utilities are already receiving a windfall. This is not just the view of Sunesys and other communications providers. The Commission, the courts and the states have all previously reached the same conclusion.¹⁴ Utilities, ignoring this long line of precedent, argue that attachments result in many “hidden costs” such as having to trim more trees around larger poles and extra time needed to replace taller poles when and if such replacement becomes necessary.¹⁵ But each of these costs are either non-existent, immaterial, or easily recoverable through up-front payments. The courts, Commission, and states are correct: the current Predominant Broadband Rate does not result in a subsidy for communications providers.

4. The Majority of States Regulating Pole Attachment Rates Use the Predominant Broadband Rate.

The majority of states that regulate pole attachment rates have concluded that the proper broadband rate for all providers is the Predominant Broadband Rate.¹⁶ If the Commission concludes this as well, there will be near uniformity across the country on this important issue. Conversely, if the Commission finds that the appropriate broadband rate is the High Broadband Rate, regulatory inconsistency will reign as so many states have already concluded otherwise.

¹⁴ *See, e.g.*, Comments of Comcast Corporation, p. 4 (Filed in WC Docket No. 07-245) (“Comcast Comments”).

¹⁵ *See, e.g.*, Comments of the Coalition of Concerned Utilities, pp. 23-24 (Filed in WC Docket No. 07-245) (“Concerned Utility Comments”).

¹⁶ *See, e.g.*, TWTC Comments, pp. 10-14; Comcast Comments, pp. 21-23.

5. **The Methodology Used for the Predominant Broadband Rate is Consistent with that Used for Other Types of Space Rentals.**

The Predominant Broadband Rate's methodology most accurately reflects the manner in which our society addresses space rental in general. Under the Predominant Broadband Rate, the rate paid is based on the space utilized, and it is irrelevant how many other "renters" attach to the pole. Similarly, in an apartment building, the amount of rent paid for the space utilized is based on the amount of space used and is not dependent upon the number of other renters. Each time a landlord rents an apartment or a lease ends, the landlord does not contact the other tenants to lower or raise their rent. The same principle should apply here. That is, the rate should be based on the amount of space used, not the number of other attachers on the pole (which is how the High Broadband Rate is calculated).

6. **The Predominant Broadband Rate Provides Needed Clarity Whereas the High Broadband Rate Would Add to the Confusion and Uncertainty with Respect to Rates.**

The Predominant Broadband Rate provides far greater clarity as to what the rates will be because the rate is not dependent on the number of other attachers at any given time. Under the High Broadband Rate, there either needs to be a presumption of the number of attachers (which presumption will often be wrong, given that the number of attachers will vary among poles) or the rates will change each time a new attacher is added or subtracted, which not only creates uncertainty but is also extremely onerous from an administrative standpoint.

7. Providers Pay the Proper Amount for Unusable Space under the Predominant Broadband Rate.

Under the Predominant Broadband Rate, a provider still pays for a portion of the unusable space. The percentage of the unusable space for which the attacher pays equals the percentage of the usable space for which it pays, both of which equal the percentage of usable space that the attacher actually uses. Thus, under the Predominant Broadband Rate, the amount of space the provider pays for directly relates to the amount of space the provider uses. Conversely, under the High Broadband Rate, the percentage of unusable space paid for is unrelated to the amount of space actually used by the attacher. Instead, the percentage of unusable space paid for is totally dependent on the number of attachers.

For example, under the High Broadband Rate, if Attacher 1 used one foot of space on one pole (where there are two other attachers), and Attacher 2 used four feet of space on another pole (where there are three other attachers), Attacher 1 would pay more for unusable space than Attacher 2 (even though Attacher 1 used far less usable space). The reason for this anomaly is because under the High Broadband Rate what matters in calculating the rate for unusable space is how many attachers are on the pole, not how much space is being used by the attacher. Simply put, when how much space you use does not determine what your rent is something is wrong. It is time that all broadband providers are charged the Predominant Broadband Rate.

II. To Eliminate Excessive and Inappropriate Make-Ready Charges, the Commission Should Adopt the Compliance Neutral Payment Rule and Reject Utilities' Request to Impose All Rules They Desire at their Whim

A. The Commission Should Adopt the Compliance Neutral Payment Rule

Section I above addresses the ongoing imposition of excessive rental rates for pole attachments. This section, while also addressing unreasonable charges, concerns excessive and inappropriate utility charges for make-ready and other up-front work. As Sunesys described in its initial Comments, Sunesys is often deterred from entering a market to provide broadband, or it has been forced to exit a market, due to excessive and inappropriate charges for make-ready and other initial work, which charges are not supported by the law.¹⁷ Other providers have experienced similar overreaching from utility companies. For example, as One Communications Corp. stated in its comments (filed jointly with TWTC):

FiberNet [a subsidiary of One Communications Corp.] is also routinely charged by utilities to correct errors caused by prior attachers to prepare the pole for FiberNet's attachment. *See id.* ¶¶ 6-8. In one case, as part of its make ready charges, the contractor for the pole owner, American Electric Power ("AEP"), is charging FiberNet to move the attachments of two pre-existing attachers to another pole even though there is no nexus between FiberNet's attachment and the need to move the cable attachers. *See id.* ¶ 9. In another case, AEP's contractor is charging FiberNet to replace an existing pole with a longer pole even though FiberNet's attachment will fit on the existing pole, thereby forcing FiberNet to subsidize AEP's future growth. *See id.* ¶ 10. Conduct such as this unnecessarily increases FiberNet's costs and diminishes the resources available to deploy broadband internet access to consumers.¹⁸

Moreover, the Commission has already held on multiple occasions that a utility is not permitted to charge a new attacher to correct preexisting safety violations on the

¹⁷ Comments of Sunesys LLC, pp. 9-10 (Filed in WC Docket No. 07-245) ("Sunesys Initial Comments").

¹⁸ TWTC Comments, pp. 16-17.

poles.¹⁹ Yet, such unlawful charges keep occurring, as case-by-case adjudication clearly has not worked with respect to this issue. The only way to prevent these charges once and for all is for the Commission to adopt a clear rule. Under Sunesys' proposed rule, the "Compliance Neutral Payment Rule" or "CNP Rule", a utility would be permitted to charge an attacher for compliance neutral work ("CN work") but not compliance altering ("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").*

It is clearly time for the Commission to adopt the CNP Rule to address the excessive and inappropriate make-ready charges imposed by utilities.

¹⁹ See *Knology, Inc. v. Georgia Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 24615, ¶ 37 (2003) ("[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599, ¶ 19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

B. Utilities' Attempts to Acquire Virtually Unlimited Discretion with Regard to Pole Attachment Requirements Must be Rejected

The CNP Rule discussed above, which is desperately needed, will be completely undermined if some utilities obtain the relief they are seeking in this proceeding. These utilities argue that they should have the right to impose any and all requirements they desire upon attachers, no matter what the rules are, so long as those rules are imposed on all third-party attachers.²⁰ That is, under their view, a utility could impose unreasonable rules with impunity so long as they impose such unreasonable requirements on all attachers. Under their view, a utility could impose cost prohibitive rules so long as they did so to all attachers. It is just this type of warped logic that is causing such delay and abuse in the pole attachment process and mandating Commission action here. Utilities should not have the right to undermine broadband deployment by creating their own rules that go over and beyond those issued by federal, state and local authorities or required under generally accepted industry standards.

In the cable franchising proceeding, the Commission preempted local level playing field requirements where such requirements, in the Commission's view, undermined the Commission's goals.²¹ Here, utilities are seeking to go one step further and claim that even if a requirement has never been accepted by anyone, a utility can impose such a requirement on everyone, as long as it does so uniformly – regardless of how unreasonable the requirement is and regardless of whether the requirement undermines broadband deployment. Such request should be rejected, as this Commission

²⁰ See, e.g., Comments of the Edison Electric Institute and the Utilities Telecom Council, p. 70 (Filed in WC Docket No. 07-245) (“EEI Comments”).

²¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 F.C.C.R. 5101 (2007) (“Cable Franchising Order”).

should impose the CNP Rule, and make it clear that a utility cannot impose any requirements over and above those imposed by federal, state and local laws and industry standards.²²

III. To Remedy the Interminable Delays in Connection with Obtaining Pole Attachment Permits, the Commission Should Impose the Six Month Rule, Refuse to Restrain Providers' Rights to Bring Legitimate Actions Against Utilities, and Forego at this Time from Adopting Proposals Regarding Larger Penalties for Unauthorized Attachments

A. The Commission Should Adopt the Six Month Rule

The comments in this proceeding are replete with examples of interminable delays in the issuance of pole attachment permits.²³ Waiting for a utility to actually perform all steps necessary to provide the permit is often like “Waiting for Godot.” You just wait, and wait, and then wait some more. Month after month after month after month passes by, and then sometimes the years pass by, and often the customer is long gone.

The Commission, it would appear, has two options with respect to this issue: (i) the Commission may either impose a deadline on utilities with respect to the maximum length of time that they can take to issue a pole attachment permit, or (ii) the Commission may continue to permit – and indeed, condone, the dilatory actions of many utilities under the present system. The utilities have brazenly asked that the Commission maintain the present system, in which delays for attachers are often interminable as the utilities stonewall the efforts of broadband providers to serve their customers. But

²² In the *Cable Franchising Order*, the Commission preempted local laws that were inconsistent with the Commission's holdings in that proceeding. The Commission should take the same action here.

²³ See, e.g., Sunesys Initial Comments, pp. 7-8; Comments of NextG Networks Inc., pp. 6-8, 20-22 (Filed in WC Docket No. 07-245) (“NextG Comments”); TWTC Comments, pp. 16-18; Comments of segTel, Inc (Filed in WC Docket No. 07-245), pp. 4-6.

obviously, something needs to be done, and real deadlines must be instituted. The absence of a real deadline is a recipe for utility abuse – as attachers like Sunesys, unfortunately, know all too well. An attacher, and its customer, both need to know the window in which an attachment will be completed, and it must be completed in a timely fashion. This is not an area where better late than never works very well.

Indeed, in the cable franchising area, the Commission has recently imposed deadlines where its jurisdiction to do so was at best unclear, and where the facts were not nearly as strong in support of any such deadlines.²⁴ With respect to such cable franchising deadlines, the Commission imposed a shot clock on the time by which local franchising authorities (“LFAs”) must respond to cable applications even though (i) there was significant disputes as to the existence of any delays caused by LFAs, and (ii) LFAs did not have control over how long the franchising process would take (because franchise agreements are actually negotiated instruments, not “take or leave it documents”). Here, the case for a deadline is far, far clearer given that private entities are involved, the evidence of delays by utilities is overwhelming, and utilities actually do control how long the process takes. Given that the Commission imposed such deadlines on municipalities, the Commission certainly should not refuse to impose deadlines here where its jurisdiction to do so is much clearer, and the case for deadlines is so much more compelling.

²⁴ *Cable Franchising Order*, 22 F.C.C.R. ¶67.

Many commenters in this proceeding have requested that the Commission impose relatively short deadlines on utilities to perform the survey and make-ready work so that customers can actually begin receiving their services promptly. These proposals generally identify deadlines of approximately one to three months from date of application to date of permit, assuming no delays on the part of the attacher.²⁵ Several states support these short deadlines as well.²⁶

While Sunesys believes these proposals properly address the delay issue and are reasonable, and would not object to their adoption by the Commission, in the interest of compromise Sunesys has provided an alternative proposal, known as the Six Month Rule.²⁷ Under the Six Month 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.
- 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.)

No utility can honestly claim that it cannot meet such six month deadline, which deadline is far longer than many others have proposed and several states have adopted. Without any deadline at all (which is what utilities brazenly support), delays will continue to reign supreme, to the detriment of broadband deployment and consumers across the nation.

²⁵ See, e.g., Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc, pp 21-24 (Filed in WC Docket No. 07-245) ("Fibertech Comments"); NextG Comments, p. 21; TWTC Comments, Appendix B, p. 3.

²⁶ *Id.*

²⁷ Sunesys Initial Comments, pp. 14-15.

Utilities, seeking to avoid the imposition of any deadline, raise a number of specious arguments in an effort to maintain their right to continue to act at a turtle-like pace. First, many utilities had previously claimed that whenever there is a significant delay, the attacher has the perfect remedy: simply file a complaint.²⁸ Complaints, however, are extremely costly, and therefore cannot be resorted to often, as providers need to allocate their resources to building and operating their networks, not litigating against utilities. Moreover, and more fundamentally, complaints merely add to the underlying delay as they take considerable time to resolve. In short, complaints do not resolve the delay issue, they merely exacerbate it, at considerable cost to the attacher and to the detriment of broadband deployment.

Some utilities also respond with what can only be characterized as a “have their cake and eat it too” argument. On the one hand, these utilities claim they do not have enough staff available to perform the necessary work quickly if multiple attachment requests are received at around the same time; yet on the other hand these same utilities contend that they will not permit utility approved third-party contractors to perform the work.²⁹ But the Commission should not let utilities have it both ways. Broadband is critical to this society and the work necessary to provide broadband to consumers must be done promptly.

Accordingly, if a utility does not want to permit utility approved contractors to perform the work that is fine, as long as the utility has enough staff to do it promptly.

²⁸ Most of the utilities who claimed that complaints were an adequate solution did so in connection with Fibertech’s initial request for a rulemaking, and, interestingly, did not raise this argument again in their initial comments here, perhaps realizing just how specious an argument it is.

²⁹ See, e.g., Concerned Utilities Comments, pp. 84-88.

Conversely, if a utility refuses to retain sufficient staff to do the work that is fine, as long as the utility allows utility approved third-party contractors to perform the work.

Some utilities even concede that third-party contractors are completely capable of performing the make-ready work.³⁰ Moreover, while most utilities deny that third-party contractors can do the survey work, that contention is simply false. In fact, Sunesys' affiliate, Infrasource Incorporated, is a third-party contractor that performs the survey and make-ready work for PECO. Third-party contractors for PECO can, and do, perform every step of attachment work, including the surveys and make-ready work, and this third-party arrangement works perfectly well for everyone involved, including both the utility and the attachers – to the tremendous benefit of end-users and broadband deployment.

Some utilities also argue that if broadband providers use utility-approved contractors, those contractors will not have sufficient time to perform the utilities' work.³¹ But these contractors are free to earn a living any way they please. A request that the Commission refrain from imposing new broadband-critical regulations so that third-party contractors can be forced to “wait around” for more assignments directly from the utilities themselves, rather than engage in work that is needed for this country's future, is unheard of, and is certainly not a reason to slow down broadband deployment.

Also, some utilities claim that they cannot timely perform make-ready work because they must wait for other attachers, some of whom may be non-responsive to

³⁰ See Comments of Florida Power & Light Company, Tampa Electric Company, and Progress Energy Florida, Inc. p. 21 (Filed in WC Docket No. 07-245) (“FP&L Comments”).

³¹ See, e.g., Concerned Utility Comments, p. 87.

relocation requests, to move their attachments.³² Utilities, however, can easily make this a non-issue by simply including in their pole attachment agreements language to the effect that if an attacher does not timely relocate when requested to do so, the utility or the new attacher can move the attachment at the old attacher's expense. If desired, utilities can require deposits from each attacher to apply against the amount owed under these circumstances.³³

B. The Commission Should Not Eliminate Providers' Rights to Seek Relief When They Have Legitimate Claims Against Utilities

Several utilities have asked that the Commission further limit providers' rights to seek relief against utilities. These utilities claim they are frustrated when, after a pole attachment agreement is signed, the agreement is then challenged by the provider.³⁴ But what the utilities fail to mention is that without such a rule, providers are left with a Hobson's choice: either agree to unreasonable terms that may make their service unprofitable or the risks involved untenable, or forego the attachment for the foreseeable future and risk losing the customer altogether. As utilities cannot and did not dispute, pole attachment agreements are not negotiated – they are take it or leave it ultimatums from the utility. Given these circumstances, providers must retain their rights to file legitimate actions against utilities who are acting unlawfully – as broadband deployment is dependent upon it.

³² See, e.g., EEI Comments, p. 40.

³³ Some utilities also claim that union contracts prevent them from allowing the use of third-party contractors. See Concerned Utilities Comments, p. 89. Even if this is true, those utilities, assuming those contracts cannot be overcome, will then need to make sure they have sufficient staff to at least meet the Six Month Rule, which should not be at all difficult to meet.

³⁴ See, e.g., UTC Comments, p. 35.

Moreover, utilities have nothing to be concerned about if they act properly. In such event they will prevail in any such action brought by the provider (if such action is even pursued in the first place). What utilities are truly frustrated about is that they keep losing these challenges because they have not acted within the confines of the law.³⁵

C. The Commission Should Hold Off Increasing the Penalties for Unauthorized Attachments at this Time

Several utilities claim that penalties for unauthorized attachments should be dramatically increased.³⁶ These utilities contend that without a sufficient deterrent, attachers have no incentive to refrain from making unauthorized attachments. Sunesys agrees that an appropriate deterrent should be in place (although nowhere near the astronomical penalties recommended by the utilities), if it is needed, but the time is not yet right to impose any additional penalties.

Prior to considering enhancing the penalties for unauthorized attachments, the Commission should first impose a deadline on utilities for issuing permits, as proposed by Sunesys herein. Once the deadline has been in place for a reasonable time, the Commission should then collect the necessary data to allow it to evaluate whether such deadline eliminates the unauthorized attachments problem. If it does not, the Commission should then make a determination as to an appropriate amount of any additional penalties for unauthorized attachments.

³⁵ UTC Comments, p. 35 (UTC acknowledges that attachers challenging pole attachment agreements on the grounds that they were forced to agree to unlawful terms have “in fact never lost a complaint at the Commission.”).

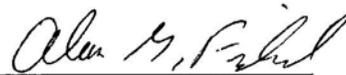
³⁶ See, e.g., EEI Comments, pp. 79-80.

IV. Conclusion

For the foregoing reasons, the Commission should adopt the proposals set forth in these comments and Sunesys' initial Comments.

Respectfully submitted,

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