Eliminating Unnecessary and Unauthorized Charges to Attachers

Presented by

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OVERVIEW

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A Very Simple Concept – Pole Upgrades, Separate And Apart from Attachments, Should be Paid for by the Utility (and Not the Attacher)

- **Utilities, of Course, Have Every Right to Upgrade their Poles at any time**-- If a utility wishes to upgrade the condition of its pole (by placing it into compliance with the law, or by placing it in conformance with a later version of the NESC), it has every right to do so.
- **But such Upgrades Should Be Paid for by the Utility and Should Not be Charged to an Attacher** – While a utility may upgrade its poles, separate and apart from an attachment, it has no right to charge the attacher for such upgrade. That is, utilities have no right to wait until an attacher comes along, for the utility to then upgrade its pole for the benefit of the utility and at the sole cost of the attacher.

Utilities Nevertheless Continue to Seek to Have Their Cake and Eat it Too – By Making Pole Upgrades for the Benefit of the Utility but at the Cost of the Attacher

- **Charges for Unnecessary Work --** Utilities often seek to charge attachers for work that is unnecessary (i.e., work that is not necessary to keep the pole in compliance with laws or generally accepted industry standards). In those instances, 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.
- **Charges for Necessary Work that Should Be Paid for by the Utility --** Utilities also often seek to charge attachers for work that, while necessary, clearly should be paid for by the utility. For example, 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 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.

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- **Nevertheless, Utilities Engage in this Type of Overreaching** -- A few examples:
  - 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.
  - FiberNet is routinely charged by utilities to correct errors caused by prior attachers to prepare the pole for Fibernet's attachment. In one case, American Electric Power ("AEP"), is charging FiberNet to move the attachments of a couple of pre-existing attachers to another pole even though there is no nexus between FiberNet's attachment and the need to move the cable attachers. In another example, AEP's contractor is charging FiberNet to replace an existing pole with a larger pole even though FiberNet's attachment will fit on the existing pole, thereby forcing FiberNet to subsidize AEP's future growth.
  - As Current Group, LLC stated "some pole owners continue to require that an attacher pay to relocate third party attachments that were installed, in violation of the NESC or other applicable standards, so as to leave inadequate clearance for proposed new attachments. Alternatively, pole owners sometimes demand, as a condition of making a proposed attachment, that a would-be attacher remedy an existing safety violation created by a third party."

Such Utility Overreaching Derails and Undermines Broadband Deployment

- **Example of Broadband Deployment Being Derailed as a Result of such Utility Overcharging** -- 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.
- **Common Sense** – Obviously, if broadband providers are forced to pay pole owners for unnecessary or inappropriate charges, broadband deployment will be restricted and broadband rates will be higher than necessary.
- **Commission Findings**-- The Commission has previously concluded that unreasonable charges for pole attachments will create significant barriers to competition. Also, the Commission has held on multiple occasions that a utility is not permitted to charge a new attacher to correct preexisting safety violations on the poles.
- **A Rule is Needed** -- Despite such Commission rulings, such unlawful charges keep occurring, as case-by-case adjudication 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.

To Prevent this Overreaching by Utilities, Sunesys Recommends Adoption of the "Compliance Neutral Payment Rule"

Under Sunesys' Proposed "Compliance Neutral Payment Rule" (the "CNP Rule")

- A utility would be permitted to charge an attaching entity for Compliance Neutral make-ready work ("CN work").
- A utility would <u>not</u> 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

For purposes of the CNP Rule, the following definitions would apply:

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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

- The "level of compliance" of a pole is determined by all applicable laws and generally industry standards (e.g., the National Electric Safety Code)

To Avoid Undermining the CNP Rule, the Commission Should Not Permit Utilities to Impose Requirements on Attachers Above and Beyond Those Required by Law or Generally Accepted Industry Standards

- **Utilities' Unreasonable Request** -- The CNP Rule will be completely undermined if the Commission grants the utilities' request to permit them 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.
- **Laws and Industry Standards Should Govern** -- Utilities should not have the right to undermine broadband deployment by creating their own rules to be imposed on attachers, at attachers' expense, that go over and beyond those issued by federal, state and local authorities or required under generally accepted industry standards.
- **Cable Franchising Analogy** -- 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. 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.