Enough is Enough: Finally Putting an End to Pole Attachment Delays that Derail Broadband Deployment and Harm Competition

Presented by

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Utilities Frequently Cause Tremendous Delays in the Attachment Process

- **Numerous Utilities Fail to Even Respond to Pole Attachment Applications for Many Months --** Comments are replete with examples of such delays. Several utilities, for example, fail to respond to Sunesys' pole attachment applications for approximately six months or more. (Utilities also often force attachers to engage in disputes over well-settled issues, causing further delays.)
- **Many Utilities Fail to Complete Make-Ready Work Until More than a Year after Receipt of a Pole Attachment Application –** (e.g., For Sunesys, PSE&G took 4 years, Connectiv took 16 months).
- **Utilities Often Refuse to Provide Any Indication of When the Work will be Completed** -- Questions regarding scheduling are frequently met with silence.
  Therefore, it is impossible for broadband providers to manage their customers' expectations.

Utility Delays in Connection with Pole Attachments Harm Competition, and Completely Derail and/or Greatly Delay Broadband Deployment

- **Derailing Broadband Services** –- For example, Sunesys has ceased seeking to provide broadband services in Delaware as a result of Connectiv's lengthy delays (as well as excessive charges) in connection with pole attachments.
- **Delaying Broadband Services** –- Common sense dictates that significant delays in pole attachments, at the very least, significantly delay the provision of broadband services, which are dependent on such attachments.
- **Harming Competition** –- When a carrier cannot ensure timely service to a customer, that carrier may never get a chance to provide service to that customer at all.

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- **The Commission has also Recognized the Critical Importance of Timely Access to Utility Poles.**
  - "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."
  - Lengthy delays in resolving access issues are "not … conducive to a pro-competitive, deregulatory environment."

Utilities Have No Incentive to Act Promptly on Attachment Requests, and Many Utilities Actually Have an Incentive to Slow-Roll the Process

- **Many Utilities Compete Against Providers** – ILECs compete against other broadband providers, and the Commission has found that more than 600 public power entities offer some kind of broadband service. Also, UTC's goal is to promote the telecommunications business of utilities.
- **Example of Such Competition --** 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 PSE&G 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 lost due to PSE&G's dilatory action.

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- **Benign Indifference at Best** –At best, utilities have no incentive to act promptly on pole attachment requests. 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."

Other Proposals to End Delays, and the Need for a Time Limit

- **Other Broadband Providers' Proposals --** Many other broadband providers have proposed that the Commission impose time limits from date of application to date of issuance of a pole attachment permit. Such proposed time limits vary from 25 days to 90 days.
- **Utilities --** Utilities ask that the Commission impose no time limits from date of application to date of pole attachment permit.
- **A Time Limit is Unquestionably Needed** -- There needs to be a time limit from date of application to date of issuance of a pole attachment permit. The comments in this proceeding are replete with examples of interminable delays in the issuance of pole attachment permits, thereby greatly undermining broadband deployment and competition. **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.

As a Compromise, Sunesys Recommends Adoption of its Proposed "Six Month Rule," whereby

- 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.

Utility Responses Do Not Undermine, and if anything, Provide Further Support for, the Six Month Rule Proposed by Sunesys

- **Utility Silence** – No utility even addressed Sunesys' Proposed Six Month Rule, let alone, rebutted it. 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.
- **Utility Responses to Other Providers' Shorter Proposed Deadlines**

  -- *Utilities Claim Deadlines May Work with Overtime Pay*: Utilities admit that a deadline could be acceptable if providers agreed to pay overtime for the work. But that means the only reason utilities balk at other providers' proposed shorter deadlines is the utilities purportedly may lack the manpower to do the work in 30 to 90 days. With six months to do the work, however, such overtime would not be necessary even if the utility used its own employees. Moreover, independent contractors can be used to do the work.

  -- *Independent Contractors Can – and Often Do – Perform the Work*: Some utilities admit that such contractors can do the work, while others claim they cannot. But, the truth is that many independent contractors actually do the utilities' work (e.g., Henkels and McCoy; Carr and Duff; Miller Brothers Electric; Pike Contractors; Riggs Distiller, and MJ Electric). **Third-party contractors for PECO, for example, can, and do, perform every step of attachment work, including the surveys and make-ready work. Such third-party arrangements work perfectly well for everyone involved, including both the utility and the attachers – to the tremendous benefit of end-users and broadband deployment.**

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-- *Utilities Claim Deadlines Would Work for Smaller Jobs*: Utilities admit that a deadline would be acceptable for smaller jobs. Accordingly, if a 25 to 90 day deadline would work for smaller jobs, then certainly a six month deadline would work for all jobs, as that would give the utility several extra months to complete the work.

-- *Utilities' Complaint Argument*: Some utilities claim that providers should just file complaints where there are lengthy delays. Complaints, however, can be exceedingly expensive, and only lead to further delays (which was the problem to begin with). Case-by-case resolution of every pole attachment dispute only stifles competition.

-- *Utilities' Safety, Engineering and Reliability Argument*: Utilities claim that safety, engineering and reliability concerns undermine any deadline proposal. This claim is false. **Delays of a year or more in the process simply are not safety, engineering or reliability issues – they are harm to broadband deployment and competition issues.** Moreover, some utilities already timely respond to pole attachment requests and perform the make-ready work (all within about 90 days after application), establishing that such timelines can be met.

States that Regulate Pole Attachments Have Begun Issuing Deadlines as well

- **States that Regulate Pole Attachments Have Begun Issuing Deadlines --** Connecticut, Utah, Maine, Vermont

The Commission's Cable Franchising Order, by Analogy, Greatly Supports Adoption of a Time Limit Here

- **Cable Franchising Order** -- The Commission imposed a shot clock on the time by which local franchising authorities ("LFAs") must respond to cable applications even though (i) there were significant disputes as to the existence of any delays caused by LFAs, (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); and (iii) local governments want additional providers in their localities to provide their citizens with more options.
- **Pole Attachments by Comparison** -- Here, the case for a deadline is far clearer given that private entities are causing the delays, the evidence of delays by utilities is overwhelming, utilities actually do control how long the process takes, and utilities have no interest in having additional broadband providers in their service territories (in fact, many utilities even compete with the broadband providers).
- **Additional Comparison** -- In the cable franchising order, the Commission found broadband was being delayed or derailed, that the franchising process sometimes took more than a year, and that filing complaints was not an adequate remedy since it entailed additional delay and expense. All of those findings are certainly applicable here to pole attachment applications and the resulting delays caused by utilities.

The Bottom Line – The Interminable Delays Need to End

- **The Commission has Two Options with respect to this Issue**:
  - Option 1 -- The Commission may impose a deadline on utilities with respect to the maximum length of time that they can take to issue a pole attachment permit, such as the Six Month Rule (or a shorter deadline, as proposed by other broadband providers).
  - Option 2 -- The Commission may, by doing nothing, continue to permit – and indeed, condone, the dilatory actions of many utilities under the present system that greatly undermine and derail broadband deployment and competition.