Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Petition for Declaratory Ruling of American Electric Power Service Corporation, et al. Regarding the Rate for Cable System Pole Attachments used to Provide Voice over Internet Protocol Service	)	WC Docket No. 09-154
Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	WC Docket No. 07-245
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

COMMENTS OF SUNESYS, LLC

Respectfully submitted,

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COMMENTS OF SUNESYS, LLC

Sunesys, LLC ("Sunesys") hereby submits its comments to the Petition for Declaratory Ruling (the "Petition") filed by American Electric Power Service Corporation, et al. (the "Utilities").[1]

[1] Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services. Sunesys is a competitive services provider certified to provide telecommunications services in numerous states.

Introduction and Summary

In the Petition, the Utilities seek a separate ruling on the appropriate rate for pole attachments issued in connection with the provision of voice over Internet Protocol service ("VoIP"). That issue (the "VoIP rate issue"), however, should be resolved in WC Docket No. 07-245 (the "Pole Attachment Proceeding"), which will resolve the broader pole attachment rate issue and thus subsume and resolve the VoIP rate issue. The broader rate issue being addressed in the Pole Attachment Proceeding is simply this: what is the one proper pole attachment rate formula for all attachments, including cable, telecom and VoIP attachments.

Virtually every commenter in the Pole Attachment Proceeding addressing the rate issue agrees that the rate formula for all pole attachments should be the same.[2] Accordingly, once that proceeding is completed, and a uniform rate formula is determined by the Commission, that rate will by definition also apply to attachments in connection with the provision of VoIP. Therefore, the Commission should not unnecessarily expend resources now resolving an interim issue, which resolution will be mooted by the Commission's resolution of the broader rate issue – namely, what should be the uniform rate for all pole attachments.

There is, however, an issue that needs to be carved out of the Pole Attachment Proceeding, and resolved very quickly. That issue concerns incessant utility delays in the provision of pole attachments and the need for imposition of a deadline for the issuance

[2] The only possible exception is for attachments for incumbent local exchange providers. Incumbent local exchange carriers are in a different position than other providers with regard to pole attachments because of the statutory language, and they may be treated differently with respect to rental rates for several other reasons, including because they do not ordinarily pay for up-front charges such as make-ready work.

of pole attachment permits so that the provision of broadband services will no longer be undermined by such delays (the "Deadline Issue"). Many filings in the Pole Attachment Proceeding show the overwhelming strength of the arguments on the need for, and the feasibility of, imposing a deadline on the issuance of pole attachment permits. Attached are copies of two of Sunesys' most recent filings on this issue. Moreover, as discussed below, many of the Utilities' arguments in the Petition, by analogy, can be applied with far more force to support the urgent need for the imposition of a pole attachment deadline, than they can to support any need to quickly resolve the VoIP rate issue.

I. It is Undisputed that Timely Access to Pole Attachments is Critical to the Deployment of Broadband Services

Pole attachments are critical to broadband deployment. The Commission, broadband and telecommunications providers, and even utilities all agree on this indisputable point.

In the Commission's May 22, 2009 report to Congress entitled Bringing Broadband to Rural America: Report on a Rural Broadband Strategy ("May 22, 2009 Report"), the Commission stated as follows: "*Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas.*"[3] Providers of broadband and telecommunications services similarly recognize that, given the inherent and unavoidable need for the use of poles to provide broadband services, without timely and reasonably priced access to such poles, broadband deployment and competition is substantially undermined.[4] Likewise, the Utilities in their filing in this proceeding, acknowledge both that (i) utility poles are an "expedient

[3] May 22 Report at ¶157 (emphasis supplied).

physical platform for communications and broadband deployment;" and (ii) that the Commission is correct that "timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas."[5]

II. The Commission Should Impose a Deadline on the Issuance of Pole Attachment Permits Before it Resolves Any Rate Issues Concerning Attachments, Including the VoIP Rate Issue

While it is beyond dispute that it is critical to broadband deployment that pole attachment permits are (i) timely issued, and (ii) provided at reasonable rates, the issue of rates is only relevant once the Deadline Issue (i.e., access issue) is resolved, because rates are only pertinent if a party can actually gain access to poles in the first place. Notwithstanding this clear logic, the Utilities nevertheless ask for the Commission to resolve the VoIP rate issue before the Deadline Issue. But such a request is the ultimate example of putting the cart before the horse.

Nearly four years ago, in December 2005, Fibertech filed a petition for rulemaking, requesting, among other things, that the Commission impose a deadline for the issuance of pole attachment permits to end the interminable delays that impact the provision of broadband and telecommunications services.[6] Numerous parties supported Fibertech's request.[7]

In 2007, the Commission commenced the Pole Attachment Proceeding, in which it requested comment on, among other things, whether the Commission should impose a time period for the issuance of pole attachment permits, and, if so, what that time period

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[4] The Pole Attachment Proceeding docket includes numerous filings from providers indicating the need for the use of poles to provide broadband services.
[5] Petition at 3, 14.
[6] Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 (December 7, 2005).
[7] See, e.g., Comments of Sunesys, RM-11303 (January 30, 2006).

should be.[8] Since that time, many parties, including the Broadband and Wireless Pole Attachment Coalition (which itself is comprised of 14 different entities, including PCIA and Sunesys), Fibertech, Kentucky Data Link, Time Warner Telecom, One Communications, Cbeyond, Integra Telecom, and MetroPCS Communications have strongly urged the Commission to impose a time period for the issuance of pole attachment permits, and have made recommendations as to the length of that period.[9]

The record in the Pole Attachment Proceeding is replete with filings establishing both the need for a deadline for the issuance of pole attachments and the feasibility of imposing a deadline.[10] As to the need for such a deadline, providers have shown that there is a regulatory gap in the rules, and that as a result of that gap many utilities greatly delay the issuance of pole attachment permits, which harms broadband deployment.[11] As to the feasibility issue, the fact is that a number of states have already imposed deadlines for the issuance of pole attachments, some utilities timely issue pole attachment permits, and even many utilities admit that deadlines, in at least certain states, are reasonable.[12] In short, the success of broadband deployment in this country can no longer be left to chance, or to the whim of certain utilities. A time period for the issuance of pole attachment permits is needed, and is long overdue.

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[8] Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments* (rel. November 20, 2007) at ¶ 37.
[9] Ex Parte Notice of Broadband & Wireless Pole Attachment Coalition, WC Docket No. 07-245 (February 23, 2009) ("BWPA Notice"); Ex Parte Notice of Fibertech Networks LLC and Kentucky Data Link, WC Docket No. 07-245 (April 16, 2009); Ex Parte Notice of Time Warner Telecom, One Communications Corp., Cbeyond, Inc. and Integra Telecom, Inc, WC Docket No. 07-245 at 14-15 (September 15, 2009); Ex Parte Notice of MetroPCS Communications, Inc. WC Docket No. 07-245 at 7 (September 16, 2009).
[10] See, e.g., id.
[11] See, e.g., BWPA Notice at 1-5.
[12] See, e.g., BWPA Notice at 6-7; Reply Comments of Sunesys, GN Docket 09-51 (July 21, 2009), at 11-12 (citing to comments of utilities that admit that time limits in certain states can be reasonable).

In fact, the Commission has had the Deadline Issue before it for nearly four years. On the other hand, only a little over a month ago, the Utilities filed their Petition requesting that the Commission issue a ruling on the VoIP rate issue. Thus, even though the Utilities filed their Petition more than 3 ½ years after the Deadline Issue was first raised, the Utilities have requested that the Commission resolve the VoIP rate issue before the Deadline Issue. For at least four reasons, the Commission should refrain from resolving the VoIP rate issue before the Deadline Issue, and, in fact, the public would be well-served if the first step the Commission took was to resolve the Deadline Issue.

First, as discussed above, pole attachment rates are only relevant once providers are first afforded access to the poles themselves. Thus, it makes far more sense to have the Deadline Issue decided first, before the VoIP rate issue is resolved.

Second, as described above, the Deadline Issue was raised more than 3 ½ years before the Utilities filed the Petition on the VoIP rate issue. As a matter of fairness and in recognition of the legislative and regulatory emphasis on ensuring the promotion of timely broadband deployment,[13] the Deadline Issue must be addressed first.

Third, in the Pole Attachment Proceeding virtually every party agrees that the pole attachment rate formula for all services should be the same. Accordingly, the Commission should not spend its limited resources deciding a question that likely will soon be moot upon completion of the Pole Attachment Proceeding – i.e., whether VoIP service is telecommunications service or cable/Internet service for purposes of the pole

[13] As the Commission is well aware, Congress has required the Commission to deliver a national broadband plan by February 17, 2010. In addition, the ARRA provides strict deadlines for issuance of broadband stimulus funding and completion of broadband stimulus projects. Further, Section 706 requires the Commission to determine "whether advanced telecommunications capability is being deployed to all Americans *in a reasonable and timely fashion*."

attachment rates. That is, it is likely that the rate formula for all of those services will be the same once the Commission completes the Pole Attachment Proceeding.

Finally, and perhaps most importantly, while resolution of the Deadline Issue in the manner requested by Sunesys and numerous other providers will enhance broadband deployment by permitting providers to get timely access to the necessary poles, resolution of the VoIP rate issue in the manner requested by the Utilities may lead to a subsequent – and Sunesys believes incorrect - holding that all attachments should be charged under the telecommunications rate. Yet, such a result would be extremely detrimental to broadband deployment. The Utilities Telecom Council has admitted that 89% of all pole attachments are charged at the cable rate, rather than the telecommunications rate.[14] Accordingly, if the telecommunications rate becomes the rate applicable to all attachments, such a holding would lead to higher payments by broadband providers for 89% of their attachments, and thus higher rates for broadband consumers. This in turn will lead to less broadband deployment – not more.

Thus, the Deadline Issue, if resolved in the manner requested by Sunesys and numerous other providers, will promote broadband deployment. Conversely, if the VoIP rate issue is resolved in the manner requested by the Utilities, such result may undermine broadband deployment. Moreover, any decision on the Deadline Issue will not be mooted by other subsequent decisions in the Pole Attachment Proceeding. The same, however, cannot be said for the VoIP rate issue.

[14] Comments of the Utilities Telecom Council, WC Docket 07-245, at 8-9 (March 7, 2008).

III. Many of the Utilities' Arguments in the Petition Greatly Support, By Analogy, the Urgent Need for the Imposition of a Deadline for the Issuance of Pole Attachment Permits

As shown below, many of the Utilities' arguments in the Petition, by analogy, can be applied with far more force to support the urgent need for the imposition of a pole attachment deadline, than such arguments can to support any need to quickly resolve the VoIP rate issue. The Utilities' arguments, listed in the order that they appear in the Petition, are as follows (with the far stronger application to the Deadline Issue immediately following each argument):

1. Conservation of Resources Better Spent on Broadband Deployment

The Utilities argue that the Commission should expeditiously resolve the VoIP rate issue because "[t]he resulting billing disputes between cable companies and pole owners use time and resources that could be better used to deploy VoIP and other broadband technologies to help achieve important national priorities."[15]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

The time and effort spent by providers seeking to resolve disputes regarding delays in the issuance of pole attachment permits could better be used to deploy broadband services. In fact, with respect to such delays, it is not just the time and effort spent disputing the issue that causes a waste of resources and undermines broadband deployment, it is also the time and effort providers need to spend seeking to mollify the customer who quite naturally demands its service in a timely manner, and often becomes extremely frustrated and angry about the

[15] Petition at 2.

delays. In addition, providers often spend considerable time and effort searching for alternative solutions when the utility delays become incessant. Even in those very limited instances where an alternative may exist, it is generally far more costly to implement and adds tremendous additional delays to construction time.

2. Removal of Regulatory Uncertainty

The Utilities argue that the requested ruling is "urgently needed to remove any uncertainty regarding the applicability of the Telecom Rate to cable company attachments used to provide VoIP."[16]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

A time period is urgently needed to remove the substantial uncertainty with respect to the length of time in which broadband providers must wait to receive pole attachment permits, and therefore the length of time in which their customers must wait to receive broadband service. Many pole owners fail to issue permits until a year or more after receipt of an application. Commenters in the Pole Attachment Proceeding describe delays reaching, for example, 12 months, 15 months, 16 months, 3 years, and 4 years.[17] Given the Commission's, Congress' and the President's emphasis on speeding the deployment of broadband to consumers, the Commission should place a far greater priority on ensuring that providers have access to the facilities they need to provide broadband, than it should on helping utilities receive even greater revenues.

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[16] Id.

[17] BWPA Notice at 3 (citing comments of providers describing the length of the delays).

3. Addressing a Critical Regulatory Gap that Derails Broadband Deployment

The Utilities argue that "[t]o fulfill its statutory obligation to 'regulate' pole attachment rates and promote broadband, the Commission must act promptly to fill this regulatory gap…."[18]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

As discussed in numerous filings in the Pole Attachment Proceeding, there is a regulatory gap with respect to the time period within which pole attachment permits must be issued.[19] Quite frankly, what is delaying the provision of broadband is not that utilities are foreclosed from reaping even greater revenues from the issuance of attachment permits for VoIP. Rather, it is the fact that many utilities are significantly delaying the issuance of attachment permits in the first place, which permits are necessary for the provision of broadband services. The delay in gaining access to essential facilities (i.e., the poles) is what is derailing the Commission's and the providers' efforts to promote and provide broadband services.

4. Ensuring the Critical Role of Pole Attachments in Broadband Deployment

The Utilities claim that "[b]y eliminating regulatory uncertainty regarding the applicable rate for cable attachments used to provide VoIP, the requested ruling will help

[18] Id. at 2-3.
[19] BWPA Notice at 1-5.

ensure that poles and pole attachments continue to serve as an opportune platform for broadband deployment."[20]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

As discussed above, the issue which most significantly impacts the critical role of poles and pole attachments in the deployment of broadband is the uncertainty regarding how long utilities can delay the issuance of attachment permits, not the uncertainty regarding how much money utilities should receive in connection with VoIP attachments. A deadline for the issuance of pole attachment permits is desperately needed so that utility delays will end and providers can gain timely access to the attachments in order to deliver broadband to their customers. After all, the record demonstrates that everyone agrees that the timely issuance of pole attachment permits is critical to the deployment of broadband services. But given the dilatory conduct of many utilities over numerous years, one thing is certain – tremendous delays in the issuance of pole attachment permits will only come to an end if a deadline is imposed.

5. The Need for Expeditious Action

The Utilities claim that the relief they request in the Petition is a "measure the Commission can take – and should take – expeditiously...."[21]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

There is no question that – with respect to the critical issue of promoting broadband deployment - it is more important to determine, expeditiously, how long providers must wait for all pole attachments, and how long their customers

[20] Id. at 3.
[21] Id. at 4.

must therefore wait for broadband services, than it is to determine whether utilities should receive even more money than they are currently obtaining for a particular type of attachment. Providing even more revenue to utilities will not further broadband deployment – preventing them from delaying access to the needed essential facilities, however, will promote broadband deployment.

6. Eliminating Confusion and Disputes

The Utilities claim that as a result of the VoIP rate issue, there is "confusion and ongoing disputes between cable operators and electric utility pole owners."[22]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

In light of the lack of a deadline for the issuance of pole attachment permits, there is tremendous confusion among many providers and their customers with respect to when broadband service will actually be delivered to the customers. As a result, at best broadband service is often delayed, and in some instances the services may never be received. As discussed previously, as a result of the lack of deadlines there are also frequently disputes between the utilities and the providers about the timing of the provision of the services, which results in substantial and unnecessary diversion of resources that would be better spent on the actual provision of service to consumers.

7. Eliminating Unjust Competitive Advantages

The Utilities claim that unless the VoIP rate issue is resolved, "cable companies will enjoy an unjust competitive advantage relative to other telecommunications service providers…."[23]

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[22] Id. at 5.
[23] Id.

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

The lack of a deadline for the issuance of pole attachment permits allows existing attachers, including incumbent local exchange carriers and some utilities (who compete with broadband providers), to enjoy an unjust competitive advantage relative to other providers.

8. Communication Problems Result in Confusion and Further Harm

The Utilities claim that "[i]t is virtually impossible for an electric utility to determine which pole attachment rate applies to cable attachments on its poles if the attaching cable operator does not identify the nature of the service it offers using those attachments."[24] The Utilities further claim that cable operators often do not provide notice of the services they are providing.[25]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

The failure of utilities to effectively communicate with providers further impacts the ability to timely provide broadband service. It is often virtually impossible for a provider (or its customer) to know when a utility will issue a pole attachment permit, and in fact many utilities often refuse to give providers any idea of when an attachment permit will be issued. Utilities often avoid answering calls from providers, yet if they answer the response is frequently "we'll get to it, when we get to it," or words to that effect which provide no pertinent information. As a result, the tremendous delay problem with respect to the issuance of pole attachment permits is further compounded by the fact that providers cannot manage the expectations of their customers, because they have no idea when the

[24] Id. at 12.
[25] Id. at 12-13.

permits will be issued. It is a lose-lose scenario for providers, their customers, and broadband deployment in general.

9. Reducing Pole Attachment Disputes

The Utilities state as follows:

> [We] agree with the Commission that "[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas." To ensure such access, the Commission should clarify its pole attachment rules to reduce the opportunity for cable companies to instigate disputes and ensure that pole attachment rates for similar services are the same. Different pole attachment rates for similar services inherently gives rise to disputes which use time and resources that could, instead, be devoted to broadband deployment. Clarifying that the Telecom Rate applies to all equivalent telephony services, including VoIP, will eliminate the principal cause of such disputes. The best way to promote broadband is to promote competition.[26]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

By causing delay and taking advantage of the lack of any clear deadline for the issuance of pole attachment permits, utilities are a primary source for instigating disputes that impede broadband deployment. The Commission should impose a deadline on the issuance of pole attachment permits to reduce the opportunity for utilities to instigate such disputes. While it is correct that the best way to promote broadband is to promote competition, competition is best promoted by ensuring that competitors have timely access to pole attachments.

[26] Id. at 14.

10. Spurring Broadband Deployment by Encouraging Competition

The Utilities state that "applying the Telecom Rate to similar telephone services is consistent with the Commission's mandate under section 706 to spur broadband deployment by promoting telecommunications competition."[27]

Application of the Utilities' Argument, By Analogy, to the Deadline Issue

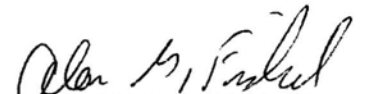
Imposing a deadline to ensure that utilities do not cause delays in the issuance of pole attachment permits is consistent with the Commission's mandate under Section 706 to spur broadband deployment by promoting telecommunications competition. Ensuring the timely access to facilities essential for the delivery of broadband is critical to promoting broadband deployment – ensuring that electric utilities receive more revenue for certain such attachments is not.

Conclusion

For the foregoing reasons, the Commission should institute a time period within which pole attachment permits must be issued prior to resolving the VoIP rate issue.

Respectfully submitted,

SUNESYS, LLC



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[27] Id. at 16.