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

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

REPLY COMMENTS OF SUNESYS, LLC

Respectfully submitted,

SUNESYS, LLC

Alan G. Fishel
Jeffrey E. Rummel
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

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SUMMARY

A timeline for the issuance of pole attachments is necessary, feasible, legal and long overdue. Access to poles is needed for broadband deployment, and therefore lack of timely access to poles at the very least delays, and in some instances completely derails, broadband deployment and competition.

While some utilities claim that a timeline could never work, the bottom line is this: numerous states already have pole attachment timelines and they do work. Some utilities also claim that they have not had an opportunity to show that timelines are inappropriate. But utilities have had nearly five years to file all of the comments and evidence they wish.

The Commission must also ensure that there are no loopholes in its new rules that inadvertently negate, or greatly undermine, the effectiveness of the timeline. The best approach is for the Commission to hold that (i) extenuating circumstances shall only cause a stoppage of the clock if those same circumstances prevent the utility from otherwise engaging in its routine business operations, and (ii) the shot-clock should restart as soon as circumstances permit the utility to re-commence its routine operations.

Numerous utilities, however, propose a litany of exceptions to any deadline and a multitude of circumstances in which the shot-clock is stopped (or even begins anew). If the Commission were to adopt the approach of the utilities, the Order itself would not be worth the paper it is written on. Rather, the exceptions would swallow the rule.

The pole attachment timeline should not be dependent on either the number of attachments requested, or the size of the utility vis a vis the number of attachments requested. Broadband deployment will be advanced much more quickly if large deployments are conducted promptly and not over a matter of many years.

There also should not be a cap on the number of poles requested by an attacher at any one time. Sunesys believes that attachers should pay in advance for the work, so they certainly will not ask for more attachments than they need. A cap on the number of attachments requested could greatly undermine broadband deployment. Where an entity is performing a large build-out, a cap on the number of poles it could request per month means the build-out may be greatly delayed over many months or even a number of years.

Some utilities claim that contractors should not be permitted to perform some or all of the work on the poles. But each utility argument on this issue is easily rebutted by the simple fact that numerous utilities all across the country frequently use contractors. Indeed, even in this proceeding, a number of utilities admit that they use contractors to perform the survey and/or make-ready work.

Utilities also argue that the Commission should do everything in its power to minimize attachers' dependence on utilities with respect to this process. Sunesys completely agrees. In fact, attachers very much want to use contractors where a utility fails to timely perform the work precisely to ensure that the attacher is no longer reliant on the utility – i.e., the utility cannot further delay the process and continue to be a bottleneck. Therefore, any right a utility may be given to oversee the contractor's work, or require an agreement with the contractor, cannot come at the expense of further delays.

Once a utility receives payment from the new attacher, it should immediately notify all existing attachers that those attachers must move, rearrange, or remove any facilities as needed to perform the make-ready work. Some utilities, however, claim that pole owners do not have the power to require existing attachers to move or rearrange their facilities in order to accommodate new attachments, and that new attachers, rather

than the utilities, should compel existing attachers to perform any work that needs to be done. But utilities clearly have the ability to require existing attachers to move their facilities to accommodate new attachers, and to move the facilities themselves if existing attachers fail to do so. The Commission's rules today require existing attachers to move or rearrange their attachments to accommodate new attachers. Moreover, utilities own the poles and thus have the right as owners of the infrastructure to require such actions by existing attachers. In addition, utilities are in a better position than new attachers to compel existing attachers to move or rearrange their facilities. Utilities have privity with existing attachers; new attachers do not. Moreover, utilities not only get paid to coordinate this activity, but they also receive the rent for use of the pole by the new attacher.

The Commission proposes that pole owners must determine which utility shall be the managing utility for any jointly-owned pole, and that requesting attachers should deal only with the managing utility. All of the utility arguments to the contrary on this issue are rebutted by the fact that any issues can be resolved between the pole owners through their agreements with each other as they are in privity. In addition, having one utility take the lead has already worked in many instances.

Attachers who are delayed in their provision of broadband services are often harmed in a myriad of ways that are not susceptible to precise damage calculations. Therefore, it is important that the Commission also require that where an attacher prevails in its action against a utility for failure to comply with the deadline in the pole attachment rules, the attacher should receive the greater of (i) compensatory damages; or (ii) liquidated damages equal to 50% of the cost of the make-ready work it was required to

pay to the utility or an approved contractor. Such attachers also should be permitted to receive attorneys' fees.

Many of the comments from utilities ironically provide further support for Sunesys' position. Several utilities argue that, where unlawful delays have occurred, any proceeding involving a determination of the attacher's compensatory damages would be very complicated and time-consuming. The remedy then is simple – the liquidated damages proposal of Sunesys, under which liquidated damages would be very easy to calculate and not time-consuming at all.

If a utility wishes to require that attachers take steps in addition to those required by applicable laws and the NESC in the guise of safety or reliability, such actions should be performed at the utility's cost. Otherwise a utility would be able to impose any standard whatsoever under the guise of safety or reliability, and thereby greatly increase the cost of providing broadband, without any verification that the utility's alleged justifications are correct.

The Commission should not increase the amount of permissible penalties at this time for purportedly unlawful attachments in light of the environment that has led to the current conditions. Sunesys suspects that in many instances involving unlawful attachments, parties have performed such attachments because the utility spent a year or more delaying approval of an application, and the attacher believed it had no choice. The Commission should not focus on penalizing such attachers for their past misconduct any more than it should focus on penalizing utilities for their past misconduct with respect to ignoring, in some cases for years, attachers' request for access. Moreover, to allow greater penalties for unlawful attachments, which provides a tremendous windfall to the

utility involved, would actually reward in many instances those utilities who have acted the most egregiously here.

While Sunesys could support amending the "sign and sue" rule in the matter set forth in its Comments, one important point to remember is this -- the sign and sue rule only harms a utility that is violating the law by imposing an illegal provision.

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REPLY COMMENTS OF SUNESYS, LLC

Sunesys, LLC ("Sunesys"), by undersigned counsel, hereby submits the following reply comments ("Reply Comments") in the above-captioned matter.[1]

DISCUSSION[2]

I. A Timeline for the Issuance of Pole Attachments is Necessary, Feasible, Legal and Long Overdue

A. A Pole Attachment Timeline is Necessary

As discussed in Sunesys' Comments, a timeline for the issuance of pole attachment permits is undoubtedly necessary. Every party acknowledges that access to poles is needed for broadband deployment. Therefore, as a matter of elementary logic, lack of timely access to poles at the very least delays, and in some instances completely derails, broadband deployment and competition.

Not surprisingly, a firm deadline can greatly reduce, if not completely eliminate, this significant problem. As the Commission found, the record in this proceeding

[1] Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (2010) ("Further Notice").

[2] Sunesys incorporates by reference its Comments filed on August 16, 2010. See Comments of Sunesys WC Docket 07-245 (Aug. 16, 2010) ("Sunesys Comments" or "Comments"). For the convenience of the Commission, Sunesys does not repeat in these Reply Comments all of the issues addressed in its Comments but still strongly believes the Commission should adopt all of the positions set forth by Sunesys in its Comments.

includes many examples of make-ready delay in states without make-ready timelines, in contrast to evidence of more expedited deployment in those states that have adopted timelines, and particularly New York and Connecticut.[3]

Some utilities who claim that a pole attachment deadline is not necessary argue that the enforcement process can solve all ills.[4] But that ignores (i) what has occurred for the past dozen or more years, and (ii) common sense. The enforcement process has been in place for many years, yet pole attachment delays continue to bog down and derail broadband deployment and competition. Sunesys and many other attachers involved in this proceeding would certainly not have expended the type of resources they have in this matter if such attachers were not incurring significant pole attachment delays greatly harming their business, which business (when it is not impeded) directly advances broadband deployment and competition.

As numerous attachers have stated previously in this proceeding, sometimes waiting for a utility to issue a pole attachment permit is like "Waiting for Godot."[5] You just wait and wait and hope someday it occurs. And if you seek to contact the utility, it frequently either does not return the telephone call or informs the helpless attacher that the utility will perform the work when it gets around to it. The clear message is: don't call us, we'll call you.

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[3] Further Notice ¶ 26.

[4] Comments of Allegheny Power, Baltimore Gas & Electric Co., Dayton Power & Light Co., First Energy Corp., National Grid, NSTAR, PPL Electric Utilities, South Dakota Electric Utilities, Wisconsin Public Service Company, WC Docket 07-245 at 15 (August 16, 2010) ("Allegheny Power Comments") .

[5] Letter from 360networks (USA), Inc., Cavalier Telephone, LLC, The DAS Forum (a membership section of PCIA), ExteNet Systems, Inc., Fibertech Networks, LLC, Kentucky Data Link, Inc., MetroPCS Communications, Inc., Newpath Networks, LLC, NextG Networks, Inc., segTel, Inc., Sunesys, LLC, T-Mobile USA, Inc.. and The Zayo Bandwidth Entities, including Zayo Bandwidth Central, LLC, Zayo Bandwidth Central (Virginia), LLC, Zayo Bandwidth Indiana, LLC, Zayo Bandwidth Northeast, LLC, Zayo Bandwidth Northeast Sub, LLC, Zayo Bandwidth Northwest, LLC and Zayo Bandwidth Tennessee, LLC, WC Docket 07-245, Attachment at 7 (Sept. 19, 2008).

Moreover, it is hardly surprising that the enforcement process alone cannot address this problem because that process itself involves significant delays and further expense, discouraging attachers from even filing complaints. It is a pyrrhic victory for an attacher to prevail in a complaint proceeding but expend much of the revenue that it would have earned from the broadband deployment on legal fees securing that result.

In addition, the delays involved in such enforcement proceedings do not allow the attacher to receive what it also needs – timely access. In sum, utilities know full well that attachers do not have the resources, time or energy to dedicate to filing multiple complaints against utilities for their pole attachment violations. That process alone has never been the answer to the delay problem and it never can be.

Nevertheless, at least one group of utilities claims that imposing a firm deadline will create more disputes.[6] But such an argument defies logic. Making the rules clearer does not create disputes – it eliminates them. In fact, at the September 28, 2010 FCC Pole Attachment Workshop (the "FCC Workshop"), several panelists from state commissions commented that by imposing a deadline in their states, disputes have diminished because deadlines create expectations by which the parties need to abide. That is, it is no longer the wild, wild, west in those states with respect to the pole attachment process. Rather, it is a more predictable process. That, of course, is what is needed throughout the country, because broadband deployment is critical for all U.S. citizens, not just some.

In addition, certain utilities argue that a timeline is unnecessary because only some states have adopted timelines to date, and in those states the length of the timelines

[6] Allegheny Power Comments at 29-30.

vary.[7] To say the least, the utilities' argument does not prove a timeline is unnecessary. In fact, if it was not necessary, no state would have imposed a timeline. Moreover, the same situation existed with respect to cable franchising (where some states had issued timelines and those timelines varied), and yet the Commission in that context issued federal timelines in that proceeding. The utilities' argument ignores elementary logic and analogous Commission precedent.

Finally, some utilities repeatedly raise the specious argument that a timeline is unnecessary because utilities do not have a disincentive to timely issue pole attachment permits.[8] However, a number of utilities, actually do have a disincentive to issue pole attachments because they compete with attachers. But equally importantly, the remaining utilities simply do not have an incentive to perform the work, and therefore some of them delay for great lengths of time issuing permits.

B. A Timeline for the Issuance of Pole Attachment Permits is Feasible

The objective facts unquestionably demonstrate that a timeline for the issuance of pole attachment permits is feasible. Some utilities raise a whole host of arguments for why a timeline could never work,[9] and while each of those claims can be undermined on an individual basis, there truly is no need to do so because the bottom line is this: numerous states already have pole attachment timelines and they work.

The Commission's proposed timeline in this proceeding is largely based on the New York law that has been in existence for many years with unquestionable success.

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[7] Comments of Edison Electric Institute and United Telecom Counsel, WC Docket 07-245, at 15, 18 (Aug. 16, 2010) ("EEI Comments")

[8] Allegheny Power Comments at 19.

[9] See, e.g, Allegheny Power Comments at 14.

Therefore to claim it cannot work and that the Commission should not impose a timeline is akin to asking the Commission to put blinders on and ignore what is happening in many states. [10]

In fact, even many of the utilities that claim a timeline is unworkable, later comment that some states' timelines are more reasonable. One group of utilities argued that "in Utah, a 120-day make-ready [deadline] may represent a better balance" between the ability of the pole owner to complete the work and the need for it to be finished without undue delay.[11] Another group of utilities pointed to Vermont, which has imposed time limits, as a state that "has established more reasonable deadlines."[12] While the length of the time periods imposed in Utah and Vermont are not necessary (i.e., time periods can be much shorter), what it appears that everyone agrees to either explicitly or implicitly is this: the imposition of time limits for pole attachment permits can be reasonable and feasible.

Indeed, the comments of Ameren Services Company, Centerpoint Energy, Houston Electric, LLC and Virginia Electric Power Company (the "POWER Coalition") provide that "[t]he members of the POWER Coalition do not oppose the timeline for pole attachment access set forth in the NPRM and the Commission's proposed Rule

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[10] Utilities who argue that it is not feasible raise the same arguments they have made for the past several years, which arguments Sunesys and many other parties have rebutted throughout this proceeding, and which arguments are still meritless. For example, the utilities argue that establishing deadlines means that a utility cannot plan its work or has to give priority to communication providers. Allegheny Power Comments at 16. But the fact of the matter is that deadlines similar to those proposed by the Commission are not only working in New York and Connecticut, but many utilities routinely meet them. Moreover, the Commission is not providing a utility with only a few weeks to issue the permit. The utility has at least several months to do so under these proposed rules.

[11] Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council, WC Docket. No. 07-245, 8 (Apr. 16, 2009).

[12] Ex Parte Filing of Allegheny Power, et. al., WC Docket 07-245, at 8-9 (May 1, 2009). See also Allegheny Power Comments at 28-29.

1.1420…."[13] In addition, while Verizon does not support the imposition of a deadline, it implicitly admits that the timeframes the Commission proposes are very close to what is necessary to complete the pole attachment process. Specifically, Verizon states that if the Commission imposes a deadline it should eliminate the 14 day period in Stage 2 (eliminate the separate period for providing the make-ready estimate), and add 15 days to stage 4 (performing the make-ready work).[14]

C. The Commission Has the Authority to Issue Timelines

The Commission correctly recognizes that it has the authority to issue a deadline here. Nevertheless, some utilities continue to claim that it does not, arguing that the Commission only has the authority to resolve disputes concerning the rates, terms and conditions of access.[15] The statute, however, does not limit the Commission's authority to simply resolving disputes. Perhaps the most important term and condition concerning pole attachments is defining when an attacher can actually get on a pole – because without access, an attacher has nothing, and all of the other terms and conditions are

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[13] Comments of Ameren Services Company, Centerpoint Energy, Houston Electric, LLC and Virginia Electric Power Company, WC Docket 07-245, at 4 (Aug. 16, 2010) ("Ameren Comments"). The POWER Coalition does, however, seek certain exceptions to the Commission's proposed rules, some of which would undermine its effectiveness. In addition, Florida Power & Light, Tampa Electric, Progress Energy Florida, Gulf Power, and Florida Public Utilities ("Florida Utilities") are also supportive of much of the Commission's proposed rules, but they also seek some exceptions that would make the rules ineffective. See Comments of Florida Utilities, WC Docket 07-245 at 10 (Aug. 16, 2010). For example, the Florida Utilities seem to claim that utilities do not have to perform make-ready work. Id. at 17-18.

[14] Comments of Verizon, WC Docket 07-245, at 25-26, 30-32 (Aug. 16, 2010). Verizon contends that the Commission should impose guidelines rather than deadlines. Id. at 28-30. Given the long and tremendous history of delays, the need to advance broadband deployment now, the fact that other states have successfully employed deadlines, and the lack of incentives for utilities to perform the work (and in Verizon's case the disincentives), there is no reason to believe that guidelines will achieve what the Commission wants and what the public needs.

[15] EEI Comments at 13.

meaningless. Thus, the Commission clearly has the authority to issue rules to ensure that such access can be timely provided.

Utilities also argue that the Commission has not adequately explained its reasons for considering imposing a timeline given that years ago it did not impose one.[16] But 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.[17] 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...."[18] The record clearly demonstrates that the Commission's existing pole attachment regulations and policies have not sufficiently protected the Congressionally-mandated goals of access and competition, and have instead resulted in tremendous harm. Without a doubt, the time for more specific rules has come, and the Commission has more than adequately explained in the Further Notice why that is the case.

D. The Time is Ripe for the Commission to Issue Deadlines

Some utilities claim that the Commission should not issue deadlines at this time because the utilities have not had an opportunity to show that deadlines are inappropriate, and several of the states that issued deadlines, including New York and Connecticut,

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[16] EEI Comments at 14-15.

[17] 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").

[18] Id.

studied the issue very carefully before doing so.[19] With respect to whether utilities have had an opportunity to respond in this proceeding, a petition for rulemaking in this matter was filed in late 2005, to which Sunesys and other commenters filed their first set of comments in January, 2006. Since that time, the Commission issued an NPRM on this issue and then subsequently issued this FNPRM. Utilities have had nearly five years (58 months), to file all of the comments they wish and provide any and all information they wish to the Commission. Utilities certainly have had an ample opportunity to comment and respond. In fact, they have had more than enough time. The moment has come for a decision to be reached, and broadband deployment to be advanced.

As to the utilities' argument that other states have studied this matter in depth before issuing deadlines, that argument actually supports Sunesys' position here. New York and Connecticut did study this issue extensively and determined that deadlines are needed and feasible. The Commission can rely on their studies as well as its record over the past five years in this proceeding to resolve the matter. It does not need to reinvent the wheel any further.

II. There Should be Very Few Adjustments to the Timeline

A. The Commission Should Ensure that there are No Loopholes/Exceptions that Undermine the Effectiveness of a Deadline

The Commission must also ensure that there are no loopholes in its new rules that inadvertently negate, or greatly undermine, the effectiveness of the timeline. As indicated in its Comments, Sunesys believes the best approach is for the Commission to hold that (i) extenuating circumstances shall only cause a stoppage of the clock if those same circumstances prevent the utility from otherwise engaging in its routine business

[19] Allegheny Power Comments at 26-27; EEI Comments at 17.

operations (and the utility shall as soon as practicable notify the attacher of such circumstances and the resulting delay), and (ii) the shot clock should restart as soon as circumstances permit the utility to re-commence its routine operations.[20] The Commission should also make it clear that it believes absent highly unusual occurrences (e.g., Hurricane Katrina) it would not anticipate that any extenuating circumstances would cause more than a couple of weeks of delay.[21]

In an effort to avoid having to generally comply with the deadline, numerous utilities propose a litany of exceptions to any deadline and a multitude of circumstances in which the shot-clock is stopped (or even begins anew). If the Commission were to adopt the approach of the utilities here, the Order itself would not be worth the paper it is written on. Rather, the exceptions would swallow the rule and the deadline would have no teeth whatsoever.

Some of the exceptions to the rule (or circumstances in which the clock would stop or begin anew) proposed by utilities include the following, with Sunesys' response following:[22]

- Some utilities claim that if there is even one pole that needs to be replaced in an application, the deadline should not apply to any of the poles[23] – The attacher often will not know if any poles need to be replaced, and it would completely undermine broadband deployment if a utility could ignore the deadline for all poles in an application simply because one or a couple of poles would need to be replaced. Rather, the utility should not be required to replace those poles within the deadline but still should be required to perform the work for all other poles. Any other result defies common sense and undermines broadband deployment.

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[20] Sunesys Comments at 14-15.

[21] Id. at 15.

[22] The examples below of the utility proposals on these issues is not meant to be exhaustive, as the utilities took the "kitchen sink approach" here.

[23] Allegheny Power Comments at 30.

- Some utilities request suspension or extension of the deadline where a utility has to correct existing violations on the poles prior to performing any work for the applicant[24] -- But a new applicant who has done nothing wrong should not be penalized because a utility's pole is currently in violation of the law. Moreover, it rarely takes significant time to correct such violations, which the utility should proceed with expeditiously given that its poles violate the law. In fact, the panelist at the FCC Workshop from the Connecticut DPUC indicated that utilities are given two weeks to fix violations, and that such violations do not extend the deadline there.
- *Some utilities want the shot-clock to stop whenever there is a pending state proceeding regarding pole attachments*[25] – There is no reason to stop the shot-clock based on the pendency of such proceedings. Moreover, such proceedings could last years, which would lead to incredibly delays under the utility proposal.
- *Some utilities want the shot-clock to stop whenever the utility deems it appropriate*[26] -- If that is the law, the Commission's timeline can be completely undermined at the sole discretion of the utility.
- Some utilities want the shot-clock to begin anew whenever the applicant provides incomplete information or delays the process or fails to cooperate with the pole owner [27]– If these issues are material and well-defined, then such conduct should suspend the shot clock, but it should not restart the shot-clock unless it relates to an attacher failing to adequately provide material information the utility needs to even begin the process.
- *Some utilities want the deadline to be extended if agreed to under the terms of a pole attachment agreement*[28] – Pole attachment agreements are not "negotiated" in the true sense of the word, as utilities have all of the leverage. Therefore, Sunesys is concerned that utilities could essentially strong-arm attachers into consenting to extensions of the deadline under such agreements. The utilities' request here would only work under circumstances in which the utility would agree to execute the exact same pole attachment agreement with the attacher without the deadline extension, which would prove that the attacher's consent to the extension was actually voluntary.
- Some utilities request that the shot-clock be stopped where a utility provides a conditional approval that is subject to additional conditions or actions by the attacher[29] – Suspending the shot-clock under these circumstances where the utility has <u>not</u> granted the attacher an approval that permits it to unconditionally move forward is directly at odds with the Commission's objectives here and the public interest.
- *Some utilities want the shot-clock to begin whenever they decide it has begun*[30] – Sunesys believes a more objective standard is necessary and that the shot-clock

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[24] EEI Comments at 22-23.

[25] <u>Id</u>.

[26] EEI Comments at 25; Ameren Comments at 9.

[27] Allegheny Power Comments at 35.

[28] EEI Comments at 17.

[29] EEI Comments at 22.

[30] EEI Comments at 20-21.

should begin when the applicant has provided the utility with all reasonable information required in the application that is within the applicant's control.

- *Some utilities want the shot-clock to be extended indefinitely if existing attachers cause any delays*[31] – Such an approach would completely undermine the effectiveness of any deadline imposed.

B. The Number of Attachments Requested or Size of the Utility Vis-a-Vis the Number of Attachments Requested Should Not Impact the Timeline

As Sunesys stated in its Comments, the pole attachment timeline should not be dependent on either the number of attachments requested, or the size of the utility vis-a-vis the number of attachments requested. Broadband deployment will be advanced much more quickly if large deployments are conducted promptly and not over a matter of many years. Moreover, utilities can use contractors if they cannot perform the work themselves. And given that utilities have at least 105 days between the submission of the application and the issuance of the permit, they should be able to comply with any request by using contractors if necessary.[32]

If the Commission were to decide to nevertheless impose multiple timelines, which Sunesys believes it should not do, it should (i) include only two different timelines (not three or more, which will make matters even more confusing); (ii) base the timeline on the size of the utility vis-a-vis the number of attachments requested (since larger utilities have an even easier time meeting deadlines given their additional resources); and (iii) ensure the two timelines vary by at most 45 days (so as to discourage disputes).

C. There Should Not be a Cap on the Number of Attachments an Attacher May Request

There should not be a cap on the number of poles requested by an attacher at any one time. Sunesys believes that attachers should pay in advance for the work, so

[31] Ameren Comments at 10; EEI Comments at 22-23.

[32] Sunesys Comments at 11-12.

they certainly will not ask for more attachments than they need. A cap on the number of attachments requested could greatly undermine broadband deployment. Where an entity is performing a large build-out, a cap on the number of poles it could request per month means the build-out may be greatly delayed over many months or even a number of years. As stated above, given that utilities can use outside contractors, or permit attachers to do so as well, there certainly is no need to limit the number of overall attachments that a utility must process and perform.

If the Commission nevertheless wishes to place a cap on the number of attachments that can be requested by an attacher over a given period of time, it should ensure that the cap is large enough so as to not delay substantial broadband deployments.

III. Outside Contractors

Some utilities claim that contractors should not be permitted to perform the work on the poles needed by attachers to deploy broadband, or at least some of the work, such as design work,[33] even where the utility timely fails to do so. Certain utilities claim that contractors lack the expertise to perform the work, such as design work,[34] or they lack the information necessary to perform the work.[35] Other utilities argue that the contractor will not seek to perform the work in a proper or safe manner, but will only focus on performing the work very quickly.[36] In addition, some utilities claim they should be able

[33] Allegheny Power Comments at 50-51; EEI Comments at 36-37.

[34] Id.

[35] Allegheny Power Comments at 50-51.

[36] EEI Comments at 36.

to hoard contractors in case they need them for their electrical issues, and therefore such contractors should not be available to perform attachments.[37]

But each of these arguments is easily rebutted by the simple fact that numerous utilities all across the country frequently use contractors. Indeed, even in this proceeding, a number of utilities admit that they use contractors to perform the survey and/or make-ready work. As one group of utilities acknowledged, "electric utilities develop close working alliances with their contractors" and "[m]any utilities strive to establish 'alliances' with a limited number of contractors for efficiency and to assure consistently safe and conforming work practices."[38] A separate set of utilities stated that they do not object to the use of outside contractors where they fail to perform the work in a timely manner.[39] Moreover, in New York, the law requires utilities to permit contractors to perform the work if the utilities cannot timely do so – and that has worked.

The utilities' individual arguments on this issue are also easy to dismiss separately. The basic engineering involved here is not sophisticated, and numerous contractors have the expertise to perform the work. With respect to ensuring that contractors have any pertinent information that is within the utility's possession, the utility can simply inform the contractor of any information the contractor needs. As to utility claims that contractors have the wrong incentive (i.e., they purportedly want to do the work quickly rather than safely), that is simply false. Any contractor that does a poor job risks being sued and incurring substantial losses. All contractors have an incentive to avoid significant financial losses. Finally, with respect to utility requests to hoard contractors,

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[37] Allegheny Power Comments at 52.

[38] EEI Comments at 58.

[39] Ameren Comments at 13.

such is simply not necessary and is in direct conflict with the goals of this Administration of furthering the economy and reducing the unemployment rate.[40]

At the other end of the spectrum from utilities on this issue, tw telecom and Comptel recommend that attachers should be permitted to use contractors immediately even if utilities can timely perform the work.[41] While there is considerable appeal to that approach (because that way no deadline will be missed), Sunesys believes that the Commission has generally struck the right balance here, and attachers should be permitted to use contractors if, and only if, the utility cannot timely perform the work.[42]

Several related points are also important here. In this proceeding, utilities argue that the Commission should do everything in its power to minimize attachers' dependence on utilities with respect to this process.[43] Sunesys completely agrees. In fact, attachers very much want to use contractors where a utility fails to timely perform the work precisely to ensure that the attacher is no longer reliant on the utility – i.e., the utility cannot further delay the process and continue to be a bottleneck. Therefore, any

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[40] Some utilities claim that in certain situations a union contract may not permit the use of outside contractors. Allegheny Power Comments at 49. In those very limited instances, the utility may need to ensure it has adequate staff.

[41] Comments of tw telecom and Comptel, WC Docket 07-245, at 11-12 (Aug. 16, 2010) ("tw telecom and Comptel Comments")

[42] Sunesys, of course, recognizes the importance of deadlines being met. In fact, in its Comments (Sunesys Comments at 6) it proposes the following amendment to stage 1 of the Commission's proposed timeline in an effort to enhance the likelihood of deadlines being met:

> If by no later than the 30th day during the period the utility has not yet performed the survey and engineering work, the utility should notify the applicant that it has scheduled such work for a date within the 45 day period (and notified the applicant of such date). If the utility has both failed to perform the work and failed to provide the required notification within such 30 day period, the applicant should be able to immediately use an authorized contractor to perform the survey and engineering work. By including this additional simple notification requirement, applicants will no longer have to wait until after the 45th day to retain a contractor (and therefore have the survey and engineering work performed after the time period contemplated by the Commission) where the utility had no intention of performing the survey and engineering work within the 45 day period.

[43] Allegheny Power at 32, 69.

right a utility may be given to oversee the contractor's work, or require an agreement with the contractor (each of which some utilities have sought in their comments)[44] cannot come at the expense of further delays.

Therefore, a utility must ensure that its actions, vis-a-vis contractors, do not cause further delays. As to overseeing the contractor's work, it should be acceptable for a utility to do so only if it does not cause additional delays through such requirement. With respect to requiring the contractor to have an agreement with a utility, if a utility wishes to have such contracts, it should enter into those agreements now with respect to all permitted contractors so that it does not further slow down the process when the attacher needs to use the contractor. Moreover, that agreement should not permit the utility to cause further delays in the process.[45]

In addition, some utilities balk at identifying at least three permitted contractors. But attachers need contractors who they know they can use if the utility falls short of meeting the attacher's needs. Accordingly, the Commission should require a utility to name at least three permitted contractors. Indeed, utilities admit it "is possible to establish a list of qualified contractors."[46] If, nevertheless, for some legitimate reason a utility cannot do so, the Commission should then permit an attacher to use any contractor that has at least the same qualifications, in terms of training, as the utility's employees.[47]

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[44] EEI Comments at 36-37.

[45] The agreement can and likely will require the contractor to indemnify the utility against any claims arising from the contractor's work, as well as require the contractor to have adequate insurance. The agreement may also require the contractor to use materials consistent with those used by the utility.

[46] Allegheny Power Comments at 58 (these utilities do claim that they should have sole control of the number of contractors on such list).

[47] Utilities attempt to add the requirement that a contractor also has the same "safety record" as the utility but this requirement appears to be unduly vague.

Finally, some utilities argue that they should not be required to list the criteria a contractor must meet in order to be eligible to perform the work.[48] But the days of seeking to avoid transparency are long gone, and there is no good reason to withhold such information. Moreover, there is a strong reason to require a utility to disclose such information – namely, so that the attacher can quickly find a suitable contractor where such is necessary.

IV. Existing Attachers

Sunesys agrees with the Commission's tentative conclusion that once a utility receives payment, it should immediately notify all existing attachers that those attachers must move, rearrange, or remove any facilities as needed to perform the make-ready work. Sunesys further agrees that, if existing attachers fail to timely act, the utility or its agents, or the new attacher, using authorized contractors, may move or remove any facilities that impede performance of make-ready. In addition, Sunesys recommended in its Comments that the Commission should allow existing attachers at most 30 days to move or rearrange or remove any facilities needed for the make-ready work, and that the Commission should require the utility to provide a schedule to all existing attachers specifying the dates on which the attachers must take such action (but in no event shall any existing attacher have less than two weeks notice), and then if an existing attacher fails to comply, the utility, its agents, or the new attacher (using an authorized contractor) can perform the work.[49]

Some utilities claim that (i) pole owners do not have the power to require existing

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[48] Allegheny Power Comments at 59.

[49] Sunesys Comments at 10. Some utilities claim that the thirty day period for such moves or rearrangements should start anew for each existing attacher. This would delay attachments for many months, and is completely unnecessary.

attachers to move or rearrange their facilities in order to accommodate new attachments;[50] (ii) if the utility coordinates the existing attacher's move, the new attacher should pay the utility's cost relating to such coordination;[51] (3) new attachers, rather than the utilities, should compel existing attachers to perform any work that needs to be done; [52] and (4) existing attachers should pay the new attachers directly for such work.

With respect to the first issue, utilities clearly have the ability to require existing attachers to move their facilities to accommodate new attachers, and to move the facilities themselves if existing attachers fail to do so. The Commission's rules today require existing attachers to move or rearrange their attachments to accommodate new attachers. Moreover, utilities own the poles and thus have the right as owners of the infrastructure to require such actions by existing attachers. If there is any doubt, and there should not be, utilities can include language in their pole attachment agreements to ensure they have such rights.[53]

With respect to the second issue, utilities today typically coordinate existing attachers' moves and charge attachers for it as part of the make-ready costs. Sunesys agrees that these charges are proper.

There is, however, no merit to the utilities' claim that new attachers are in a better position than utilities to compel existing attachers to move or rearrange their facilities. Utilities have privity with existing attachers; new attachers do not. Moreover, utilities

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[50] Allegheny Power Comments at 24.

[51] Id. at 71.

[52] Id. at 71-72.

[53] Contrary to some utilities' contention, the Commission has the authority to permit pole owners to require all existing attachers to move or rearrange their attachments to accommodate new attachers. The Commission has the statutory authority to regulate the terms and conditions of attachments. That authority would be completely undermined if the Commission could not ensure attachments may occur because existing attachers somehow have an unqualified right to refuse to accommodate a new attachment.

not only get paid to coordinate this activity and should continue to do so, but they also receive the rent for use of the pole by the new attacher. Utilities should clearly perform the coordination here, as they typically do today.

Finally, with respect to whether new attachers should pay existing attachers directly for such work or through the utility, once the work is performed the parties should be able to easily agree on the logistics of reimbursing the existing attacher.

V. Jointly Owned Poles

The Commission proposes that pole owners must determine which utility shall be the managing utility for any jointly-owned pole, and that requesting attachers should deal only with the managing utility. The Commission further proposes that both pole owners should make publicly available the identity of the managing utility for any given pole. Sunesys fully supports the Commission's position on this matter, as the pole attachment process is difficult enough without requiring attachers to deal with two pole owners, rather than just one.

Utilities, however, raise a host of untenable arguments for why the Commission's proposal on this issue is unworkable.[54] But all of the utilities' arguments are rebutted by two facts. First, any issues can be resolved between the pole owners through their agreements with each other as they are in privity (and can therefore ensure that their rights are protected through such agreements). Second, having one utility take the lead has already worked in many instances.

[54] See, e.g., Allegheny Power Comments at 72-74; EEI Comments at 39.

VI. Remedies in Enforcement Proceedings

The Commission proposes amending its rules to permit an award of compensatory damages where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. Sunesys agrees with this recommendation but Sunesys believes that the Commission needs to go one step further.

As Sunesys stated in its Comments, attachers who are delayed in their provision of broadband services are often harmed in myriad ways that are not susceptible to precise damage calculations. Therefore, it is important that the Commission also require that where an attacher prevails in its action against a utility for failure to comply with the deadline in the pole attachment rules, the attacher should receive the greater of (i) compensatory damages; or (ii) liquidated damages equal to 50% of the cost of the make-ready work it was required to pay to the utility or an approved contractor. Such attachers also should be permitted to receive attorneys' fees.[55]

Many of the comments from utilities ironically provide further support for Sunesys' position. Several utilities argue that, where unlawful delays have occurred, any proceeding involving a determination of the attacher's compensatory damages would be very complicated and time-consuming.[56] The remedy then is simple – the liquidated damages proposal of Sunesys, under which liquidated damages would be very easy to calculate and not time-consuming at all. Both parties would also save considerable legal fees if Sunesys' approach is adopted.

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[55] Sunesys Comments at 22-23

[56] Allegheny Power Comments at 91; EEI Comments at 48-49.

In addition, some utilities claim that liquidated damages are appropriate whenever an attacher does not perform a task it is required to perform in a timely fashion.[57] If liquidated damages are appropriate in such circumstances, they are certainly appropriate here where a utility has wrongfully delayed or denied access altogether. Other utilities claim that liquidated damages for unlawful attachments should be awarded,[58] and if that is the case then liquidated damages for unlawful delays undermining broadband deployment should certainly be acceptable.

In addition, some utilities admit that sanctions are appropriate for unlawful delays relating to pole attachments in at least certain circumstances. These utilities claim that sanctions should be imposed on existing attachers who fail to timely move their attachments to accommodate new attachments.[59] If sanctions should be imposed for existing attacher delays, there is no reason why sanctions should not also be imposed for utility delays.

VII. Whether Individual Utilities, Due to Purported Safety and Reliability Concerns, Should Have the Right to Impose Extra Conditions or Barriers on Attachers, at Attachers' Expense, that are Not Required by Applicable Laws

In its Comments Sunesys recommended that, if a utility wishes to require that attachers take steps in addition to those required by applicable laws and the NESC in the guise of safety or reliability, such actions should be performed at the utility's cost. Otherwise a utility would be able to impose any standard whatsoever under the guise of safety or reliability, and thereby greatly increase the cost of providing broadband, without any verification that the utility's alleged justifications are correct. Moreover, allowing an

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[57] Allegheny Power Comments at 103.

[58] EEI Comments at 54, 57.

[59] Allegheny Power Comments at 69.

individual utility to mandate safety and reliability standards on attachers above and beyond applicable law may in many instances prevent the attachment from occurring, thereby not simply raising the cost of broadband, but denying it all together. In addition, the Commission needs to make it clear that while individual utilities shall have the right to make an initial determination about whether an attachment would violate any laws or the NESC as to safety and reliability, that judgment is subject to review by the public utility commission or a court.[60]

Some utilities in their comments requested that the Commission give them the rights to impose upon attachers, at attachers' cost, conditions above and beyond that required by the law and the NESC, but no utility justified its need to do so.

VIII. Unauthorized Attachments

Sunesys in its Comments recommended that the Commission refuse to increase the amount of permissible penalties at this time for purportedly unlawful attachments in light of the environment that has led to the current conditions. Sunesys suspects that in many instances involving unlawful attachments, parties have performed such attachments because the utility spent a year or more delaying approval of an application, and the attacher believed it had no choice. As Sunesys stated in its Comments, Sunesys believes the Commission should not focus on penalizing such attachers for their past misconduct any more than it should focus on penalizing utilities for their past misconduct with respect to ignoring, in some cases for years, attachers' request for access.[61]

Moreover, given the likely reason for many unlawful attachments, a substantial number of these attachments are probably located on the poles of utilities who have acted

[60] Sunesys Comments at 25-26.

[61] Id. at 26-28.

in the most dilatory fashion with respect to allowing pole access. Thus, to allow greater penalties for unlawful attachments, which provides a tremendous windfall to the utility involved, would actually reward in many instances those utilities who have acted the most egregiously here.[62]

If once a shot clock is in place and a grace period to remove any unlawful attachments expires, there continues to be a large number of unlawful attachments, the Commission should revisit the issue then. Sunesys' position is further bolstered by the comments of other providers who have raised serious doubts about the veracity of utility claims regarding many unlawful attachments or who claim that utilities greatly overstate the number of unlawful attachments as a means of seeking to reap a windfall in damages.[63]

IX. The "Sign and Sue" Rule

There is tremendous disagreement in the record as to whether the "sign and sue" rule should be amended either in the manner proposed by the Commission or otherwise, maintained in the same form it is in today or eliminated altogether. While Sunesys could support amending the "sign and sue" rule in the matter set forth in its Comments,[64] one important point to remember is this -- the sign and sue rule only harms a utility that is violating the law by imposing an illegal provision. If the utility's provision is lawful it will prevail in any action and there will not likely even be an action.

For utilities to argue that providers are acting inappropriately to agree to provisions they will later challenge is the epitome of the pot calling the kettle black. The

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[62] Id.

[63] TW Telecom and Comptel Comments at 32-33.

[64] Sunesys Comments at 28.

party that is acting improperly is not the provider who has acted in accordance with prevailing law and in the only manner that enables it to run its business, but rather the utility that is seeking to impose unlawful conditions on the provider. The Commission should either keep the sign and sue rule in its current form or adopt the amendment proposed in Sunesys' comments.

CONCLUSION

For all of the foregoing reasons, Sunesys respectfully requests that the Commission adopt rules consistent with these Reply Comments and Sunesys initial Comments.

Respectfully submitted,

SUNESYS, LLC

Alan Fishel (AB)

Alan G. Fishel
Jeffrey E. Rummel
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

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