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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Written Ex Parte Communication*, WC Docket 07-245

Dear Ms. Dortch:

Sunesys strongly urges the Commission to (i) adopt a timeline for the issuance of pole attachment permits in accordance with that proposed by Sunesys in its comments filed on August 16, 2010 ("Comments"); (ii) ensure that there are no gaping loopholes in its new rules that inadvertently negate, or greatly undermine, the effectiveness of the timeline; and (iii) permit qualified contractors retained by attachers to perform the necessary work where utilities fail to timely do so without allowing utilities to have an opportunity to further delay such work. Sunesys also addresses several other important issues in this letter, including matters concerning the number of attachments that may be requested, existing attachers, joint pole ownership, and prohibiting utilities from charging attachers sums that the attachers should not be responsible for paying.

This letter is not intended to discuss all of the issues in this proceeding that have previously been addressed by Sunesys in multiple filings, but, given the passage of time, Sunesys believes it is important to submit this letter to further reiterate and clarify its views on several of the many important issues in this proceeding. In addition, this letter also includes a few additional compromise proposals from Sunesys. Sunesys has always believed that what is most important here is to have dependable, predictable deadlines, and that such dependability and predictability are even more important than having the absolutely shortest possible deadline.

1. A Pole Attachment Timeline is Clearly Needed

For all of the reasons set forth in Sunesys' numerous filings in this proceeding, a timeline for the issuance of pole attachment permits is unquestionably needed. The imposition of a timeline will lead to additional jobs and help spur the economy because it will (i) produce added work in connection with pole attachments, and (ii) help foster broadband deployment and affordable

broadband options for the public, which are universally recognized as critical to economic growth.

Unfortunately, Sunesys, which filed its initial comments in a related pole attachment proceeding more than five years ago, continues to face significant delays in obtaining pole attachment permits in many instances. In fact, Sunesys has problems receiving timely pole attachment licenses in every state in which it is operating. In one state, for example, the electric utility continues to take to up to six months to perform the survey work, and once that utility receives payment for the make-ready work, it often delays for another two years before completing that work. In another state, Sunesys submitted pole attachment applications between June 2008 and September 2008, and the incumbent local exchange carrier did not even complete the survey work until February 2009 and has still not completed the make-ready work. In a third state, the electric utility delayed performing the survey work for nearly seven months, and has still not completed the make-ready work even though Sunesys submitted its applications more than a year ago.

The problems have been ongoing for many years. In fact, in Sunesys' first filing in this matter, in January 2006, it stated in part as follows:

> It is beyond dispute that Sunesys has frequently been the victim of unreasonable delaying tactics by utilities, and Sunesys knows all too well that significant delays can eliminate a competitive facilities-based provider's ability to offer services to a customer. Not surprisingly, customers generally want service by a certain date and if Sunesys cannot deliver because of utility delays, customers will go elsewhere for the service. This is not an area where the phrase "better late than never" applies. Here, when a carrier cannot provide timely service to a customer, that carrier may never get a chance to provide service to that customer at all.
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> For example, 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 it 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 had lost due to PSE&G's dilatory action. After completing this construction, PSE&G finally performed the then unnecessary make- ready work for Sunesys - leaving Sunesys with a large bill but no customer. The above example is not an aberration. While obtaining access quickly is critical to the competitive provider, utilities nevertheless often act at a snail's pace. As an initial matter, utilities frequently fail to respond to Sunesys' pole attachment applications for approximately six months or more. For example, Sunesys filed three applications with BG&E in May 2004, and did not receive any response from BG&E until February 2005 - nearly nine months later. In another state, Sunesys filed its applications in March 2005 and heard nothing from the utility until almost 6 months later.

To make matters worse, once the parties have agreed to move forward with the requested attachments, Sunesys often has no idea how long the utility will take to perform the make-ready work after Sunesys has paid for such work - and the time period is frequently excessive to say the least. In those instances, Sunesys acts almost like a bank that is giving interest free loans to the utilities, as Sunesys has paid what it owes (and in many instances far more than it owes) but then has to wait for an excessive and unpredictably lengthy period of time before it has use of the poles.

As a result of the utilities' dilatory conduct in processing pole attachment applications and performing make-ready work, in many instances the delays between the submission of pole attachment applications and the grant of the pole attachment permits have exceeded fifteen months, and in a number of instances in the case of PSE&G were in excess of four years. Sunesys also experienced tremendous delays by Connectiv in New Jersey, where it required more than sixteen months for Connectiv to perform the make-ready necessary to permit construction of a wide area network for a New Jersey public school system in Connectiv's New Jersey territory, thus delaying the school system's broadband initiative for almost a full year. These excessive delays greatly harm Sunesys and other competitive facilities-based providers, as they result in extraordinarily lengthy lead times to provide service to customers, who in many instances require service on much shorter deadlines. Thus, delays in obtaining access to the poles caused by utilities' actions are certainly a barrier to competition and discourage customers from seeking alternative facilities-based solutions to those provided by the incumbent. To add insult to injury, these delays not only often preclude competitive providers from providing service to meet customers' then current needs, but can make it more difficult for them to credibly compete for future

> business. In fact, in several instances, some of which are noted above, Sunesys has effectively been forced to forego entering certain markets or refrain from seeking business from customers that it may have otherwise obtained due to such utility delays.[1]

There is only one way to stop the above-described delays, and similar delays faced by other attachers – and that solution is to impose a timeline on the issuance of pole attachment permits. The rules need to be unambiguous and easy to apply. But where no timeline is in effect, that cannot occur, to the detriment of the public and the economy.

The Enforcement Process Alone is Not a Solution

In proposing a timeline in this proceeding, the Commission correctly recognized that the enforcement process alone does not – and cannot - guarantee timely access to poles. The enforcement process leads to even further delays and uncertainty. The process also involves substantial expense, which discourages aggrieved parties from even raising complaints in the first instance and particularly if such parties need to do so on multiple occasions. Utilities know full well that if a provider's anticipated profits from a broadband deployment may be largely or fully offset by attorneys' fees seeking the permits in the first place, the provider will be unlikely to bring a complaint. Providers' time, energy and resources need to be dedicated to providing broadband – not battling utilities in multiple FCC or court proceedings. The enforcement process has been in place for many years, yet pole attachment delays continue to plague and derail broadband deployment and competition. Simply put, the enforcement process alone has never been the answer to the delay problem and it never can be.

Many Utilities Acknowledge the Feasibility of Timelines

Even many utilities acknowledge timelines can work (which is hardly surprising since timelines do work in a number of states, including New York and Connecticut) or generally do not oppose a timeline. The comments of Ameren Services Company, Centerpoint Energy, Houston Electric, LLC and Virginia Electric Power Company (the "POWER Coalition") provide that the "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 1.1420…."[2] In addition, while Verizon

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[1] Comments of Sunesys, RM-11303 (January 30, 2006).

[2] See Comments of Ameren Services Company, Centerpoint Energy, Houston Electric, LLC and Virginia Electric Power Company, 07-245 ("Ameren Comments") (August 16, 2010) at 4. 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, 07-245 (August 16, 2010) at

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).[3]

Other utilities, while not supporting a timeline, admit 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.[4] Another group of utilities pointed to Vermont, which has imposed time limits, as a state that "has established more reasonable deadlines."[5] While the length of the time periods imposed in Utah and Vermont are unduly long, what it appears that virtually everyone agrees to is that the imposition of time limits for pole attachment permits can be reasonable and feasible.

2. The Commission Should Not Endorse Gaping Loopholes that Undermine the Timeline Imposed or Limit the Number of Attachments that Can Be Requested

As a general matter, the pole attachment timeline should begin on the date when the attacher submits, or is deemed to have submitted, a materially complete pole attachment application. An attacher should be deemed to have submitted a materially complete application on the date the initial application is actually submitted to the utility unless the utility timely notifies the attacher that the application is not materially complete (Sunesys recommends that the utility have 14 days to provide this notification).6 As discussed below, in addition to specifying how the timeline will work in the normal course, it is just as critical for the Commission to specify precisely when the timeline may be tolled, in order to ensure prompt deployment of service.

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10. For example, the Florida Utilities seem to claim that utilities do not have to perform make-ready work. Id. at 17-18.

[3] See Comments of Verizon, WC Docket. No. 07-245, 25-26, 30-32 (August 16, 2010).

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

[5] Ex Parte Filing of Allegheny Power, et. al WC Docket 07-245, at 8-9 (May 1, 2009).

[6] The Commission should hold that only material deficiencies, i.e. deficiencies that prevent a utility from performing the survey and engineering work, are material deficiencies. If any application's deficiency is immaterial there is no reason to slow down broadband deployment by tolling the timeline.

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When it is Appropriate to Toll the Timeline

The timeline should be tolled during any period of time where the attacher causes delays that impact the utility's ability to perform the necessary survey or make-ready work, but such tolling should be effective only where the utility promptly notifies the attacher in writing that it believes the attacher is causing delays, and where the utility specifically describes the conduct of the attacher that has caused the delays.

The question then remains under what other circumstances should the timeline be tolled. In its Comments, Sunesys recommends that the Commission hold that extenuating circumstances should toll the timeline only if those same circumstances prevent the utility from otherwise engaging in its routine business operations. In the spirit of compromise, Sunesys hereby recommends instead that the Commission adopt the following approach. The Commission should permit a utility (i) to have a one-time, two-week extension of the timeline merely by notifying the attacher in writing at least ten days prior to the expiration of the timeline that the utility has reasonable grounds (and the utility must provide in its notice the nature of those grounds) for needing the additional two weeks to complete the make-ready work and issue the license; and (ii) to have a one-time, four-week extension of the timeline if at anytime between the submission of the pole attachment application and the expiration of the timeline, the utility has in the relevant service area outages impacting more than 10% of its customers that last over 48 hours for such customers, and the utility notifies the attacher in writing at least ten days prior to the deadline (except that if the outage occurs within the last ten day period, then any time prior to the deadline) that it is seeking the extension on these grounds (see the chart below). Otherwise, the utility must seek a waiver from the Commission, or consent from the attacher, and receive such waiver or consent prior to the deadline for the utility to avoid compliance with the timeline.

Tolling	Generally permitted during any period of time where the attacher causes delays that impact the utility's ability to perform the necessary survey or make-ready work, but such tolling will be effective only where the utility promptly notifies the attacher in writing that (i) The utility believes the attacher is causing delays, and (ii) The utility specifically describes the conduct of the attacher that has caused the delays.

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Extension of Timeline	The timeline may be extended as follows: (i) The utility is permitted to have a one-time, two-week extension by notifying the attacher in writing at least ten days prior to the expiration of the timeline that the utility has reasonable grounds (and the utility must provide in its notice the nature of those grounds) for needing the additional two weeks to complete the make-ready work and issue the license. (ii) The utility is permitted to have to have a one-time, four-week extension of the timeline if at anytime between the submission of the pole attachment application and the expiration of the timeline, the utility has, in the relevant service area, outages impacting more than 10% of its customers that last over 48 hours for such customers, and the utility notifies the attacher in writing at least ten days prior to the deadline (except that if the outage occurs within the last ten day period, then any time prior to the deadline) that it is seeking the extension on these grounds.

Exceptions to the Timeline Must Not Render the Timeline Virtually Meaningless

As discussed in Sunesys' Reply Comments filed on October 4, 2010 (the "Reply Comments"), utilities have requested a litany of exceptions to the proposed deadline that, if adopted, would swallow the rule and render it virtually meaningless. [7] For example, some utilities want the deadline to be extended if the parties "negotiate" such a provision in the pole attachment agreement. But pole attachment agreements are generally not "negotiated," they are take it or leave it documents, and if a utility can negate the deadline by forcing providers to agree to no deadline at all (or a far longer deadline) in their pole attachment agreement, the Commission's rule will be rendered meaningless. In addition, some utilities claim that the deadline should not apply to poles for which make-ready work is necessary. But make-ready work is necessary for a significant percentage of poles, and there is no reason to exclude such poles from the deadline. If such an exclusion were adopted, the deadline would have very little beneficial impact. Other utilities claim that the timeline should not apply if the pole is out of compliance. But why should that fact adversely impact the proposed attacher who was not the cause of the non-compliance? Moreover, placing the pole in compliance should not take long. In Connecticut, utilities raised the same issue, and their claim for an exclusion was denied. Finally, some utilities want the timeline tolled if the utility provides a conditional approval. However, the critical moment in time here is not the receipt of a conditional approval, but the receipt of a complete approval and issuance of a pole attachment license so that the provider can actually move forward with its provision of broadband services.

3. Use of Contractors Once the Utility Misses the Deadline, and Coordinating Supervision of Contractors

For a pole attachment deadline to be effective, an attacher must have a prompt, inexpensive-to-achieve remedy where the deadline is missed. To that end, it is critical that the Commission permit attachers to use qualified contactors once the utility fails to meet a deadline. Otherwise an attacher will be forced to utilize the time-consuming and expensive enforcement process. Moreover, utilizing contractors where a utility misses the deadline is a win-win-win scenario because it saves the attacher significant time and money (which allows broadband to be delivered more quickly and less expensively), it eliminates the need for the utility to have to pay fines or damages, and it conserves the resources of the Commission and courts. As for which contractors may be used, Sunesys believes that the Commission should find that permitted contractors include (i) any of the contractors on a utility's authorized contractor list (which list must include at least three contractors in every jurisdiction where a utility owns poles), (ii) any other contractor that the utility already uses to perform work on the poles, and (iii) any other contractor that meets the utility's qualifications, which qualifications cannot exceed those of the utility's

[7] See Sunesys Reply Comments at 9-11 for a discussion of the utilities' proposed exceptions.

own workers in terms of training and must be made publicly available and applied in a non-discriminatory fashion.

With respect to overseeing the contractor's work, Sunesys agrees with the Commission's proposal for incumbent LECs. If the Commission does not adopt the same proposal for electric utilities that it proposes for incumbent LECs, Sunesys recommends, in the spirit of compromise, the following with respect to electric utilities:

(i) The electric utility must be provided, in writing to the person designated by the utility, at least two weeks' notice of the commencement of the contractor's work, and the electric utility shall also be offered the option of choosing between at least three different days, specified by the attacher, as the date in which the contractor will commence the work.

(ii) The electric utility shall have one week after receipt of notice to notify the attacher, in writing to the person designated by the attacher, as to which of the three proposed dates the utility shall select for the contractor to commence the work.

(iii) If the electric utility fails to timely notify the attacher, the attacher can choose any of the three proposed dates for the contractor to commence the work.

(iv) Once the contractor commences the work, the electric utility may continue to oversee the work if it chooses to do so, but such continued work will be performed on the days chosen by the contractor or attacher so long as such days are generally the business days following the commencement of the work until the work is completed.

4. Number of Attachments Requested

The Commission has sought comment on whether it should impose a limit on the number of attachments that may be requested by an attacher in any time period, such as in any one month. The answer is no, with one caveat as described below.

The Commission must not take any steps that slow down the delivery of broadband services. Broadband deployment will be advanced much more quickly if large deployments are conducted promptly and not over a matter of many years. Moreover, in light of the stimulus grants under ARRA, many providers must receive a very substantial number of pole attachment licenses quickly if they are to meet the statutory deadlines applicable to those grants. If the delays that have plagued pole attachments in the past continue, it is very likely that many stimulus projects may not meet the statutory deadlines due to pole attachment delays. In addition, the Commission should recognize that make-ready work is only necessary on a minority of the poles, making it even easier for the process to be completed relatively quickly.

Accordingly, Sunesys recommends that the Commission adopt the following approach: If in any month an attacher files an application for the lesser of (i) 5,000 poles in a month, or (ii) 5% of the utility's pole line, the utility will have to fully comply with the timeline imposed by the Commission in this proceeding. If an attacher files in any month an application that exceeds the above-stated amounts, the timeline should still apply so long as all three of the following conditions are met: (i) the contractor pays for all of the work in advance; (ii) if the utility requests, the attacher agrees to pay reasonable overtime charges for the utility to complete the work by the deadline; and (iii) if the utility cannot timely perform the attachments, the attacher's sole remedy shall be to use a contractor to complete the attachments, and the utility shall not be liable for any penalties or damages as a result of any failure to comply with the timelines.
The bottom line is this: If qualified contractors want, and are available, to perform the work for these large jobs, prohibiting them from doing so if the utility cannot timely perform the work does not help the economy – it undermines it. In addition, the Commission should expressly provide that utilities are not permitted to limit the number of attachments an attacher may request during any time period. If utilities are permitted to do so, it would completely negate the effectiveness of any timeline imposed by the Commission.

5. Existing Attachers

In its Comments, Sunesys recommends that the Commission (i) allow existing attachers at most 30 days to move or rearrange or remove any facilities necessary in connection with the make-ready work, and (ii) require the utility to provide a schedule to all existing attachers specifying the dates by which the attachers must take such action (but in no event shall any existing attacher have less than two weeks notice). If an existing attacher fails to comply, the utility, its agents, or the new attacher (using a qualified contractor) can perform the work. Sunesys still believes this approach is workable.

If the Commission, however, does not wish to adopt this approach, it should adopt an even simpler approach. The Commission should authorize and require the utility to perform, or allow the attacher or its contractor to perform, all moves or rearrangements for existing attachers on certain specified dates no later than 30 days after the payment of the make-ready fees by the attacher (with the utility providing existing attachers with at least two weeks' notice by certified letter and an opportunity to perform the work themselves if they notify the utility at least one week in advance of the scheduled date in writing to the person designated by the existing attacher that they plan to perform the work themselves and the existing attacher then performs such work on the scheduled date). Such an approach would result in a significant cost savings to attachers in most instances and would greatly simplify the process.

In sum, the issue with existing attachers should not be overanalyzed or made overly complicated. The utility simply sets a date for the work to be done (after giving proper notice to the existing attachers and the proposed attacher), and does the work on that date (or authorizes the attacher or its qualified contractor to do the work on that date) unless the existing attacher does the work itself on that date.

6. Joint Pole Ownership

The Commission has proposed that where a pole is jointly owned, the pole owners should decide which party will coordinate with the attacher with respect to all issues. Sunesys agrees with this proposal. Pole owners, however, claim that they cannot comply with such a rule because neither entity can protect the other's interests. This is not accurate. In fact, in many instances one of the two pole owners is already acting on behalf of both owners in coordination with attachers. Moreover, like any parties in privity, the pole owners can simply agree on who will coordinate with the attacher and how they will protect each other's interests. Given that these arrangements may in some instances take some period of time to finalize, Sunesys recommends that the new rules governing joint pole ownership become` effective six months after the effective date of the remaining sections of the rules relating to a timeline for pole attachment requests.

7. Utilities Should Not Have Limitless Discretion to Impose Requirements on Attachers

State commissions impose rules to ensure that utilities' practices are safe and that their facilities are reliable. Similarly, the NESC is designed to ensure that utilities' practices are safe. Accordingly, if a utility wishes to go above and beyond both applicable laws and the NESC, and to require that attachers take steps in addition to those required by applicable laws and the NESC under the guise of safety or reliability, such actions should be performed at the utility's cost, and this is particularly true where a utility seeks to upgrade its compliance level of the pole (where it was already in compliance) at the expense of the new attacher. Otherwise, broadband deployment will continue to be undermined.

8. Paying for Placing the Poles into Compliance

Where a pole is not in compliance at the time a pole attachment application is submitted, a utility should not be able to charge the new attacher the costs necessary to place the pole in compliance. There is no reason whatsoever that a new attacher should have to pay such costs. As Fibertech Networks, LLC noted in a filing in this proceeding, in *Knology Inc., v. Georgia Power Company,* Memorandum Opinion and Order, 18 FCC Rcd 24615, (2003), the Commission already held that a pole owner is not permitted to hold an attacher responsible for costs arising from the correction

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of other attachers' safety violations.[8] Yet, utilities today continue to seek to force to compel new attachers to pay such costs. The Commission needs to adopt a rule in this proceeding making clear that such a practice is impermissible.

Respectfully submitted,

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[8] See Ex Parte Letter of Fibertech Networks, LLC, 07-245 (April 16, 2009).