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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

RE: WC Docket No. 07-245

Dear Ms. Dortch:

On behalf of Sunesys, LLC ("Sunesys"), and in accordance with Section 1.1206(b) of the Commission's Rules, 47 C.F.R. §1.1206(b), undersigned counsel hereby submits the instant notice of *ex parte* presentation.

On March 21, 2011, Alan Fishel, on behalf of Sunesys, met with Angela Kronenberg, Wireline Legal Advisor for Commissioner Clyburn, and Christine Kurth, Policy Director and Wireline Counsel for Commissioner McDowell. During these meetings, we discussed the importance of the Commission ensuring that its rules with respect to timelines do not have any loopholes or limitations that negate the effectiveness of the rules and would render them virtually meaningless. In this regard, we raised the following four points:

1. The Commission should not impose a limit on the number of pole attachments that can be requested under the timeline if such limit would undermine broadband deployment. To serve large school districts or to comply with statutory requirements under BTOP grants, for example, providers will need as many as 7,000 to 10,000 attachments from a utility. If there is limit on the number of attachments that can be requested by an attacher in a month, such limit should be at least (i) 3,000 poles (and preferably 5,000 poles) or (ii) 5% of the utility's poles, whichever is less. Otherwise, simple math tells you that broadband deployment will be greatly delayed and many stimulus grants will <u>not</u> be completed within the statutory timeframe.

Sunesys further recommends that 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.**

2. If the exceptions to the timeline are vague, subject to multiple interpretations, or open-ended, the timeline's effectiveness will easily be negated. In order to avoid that result, Sunesys recommends the following:

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. 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.

3. If, after an electric utility misses the deadline, attachers must wait many weeks or months for the utility to agree on a date to oversee the work of the contractor, the deadlines will not be effective. Accordingly, Sunesys recommends the following with respect to an electric utility's opportunity to oversee the work performed by attachers:

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 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. Existing attachers should not, and need not, slow down the process. 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. In that regard, Sunesys recommends as follows:

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.

Other Issue Raised During the Meetings

During the meetings, we also discussed the issue raised in Sunesys' March 17, 2011 ex parte filing (and provided a copy of that filing) in which Sunesys stated as follows:

The Commission's pole attachment rules should also include the following:

- A utility may not charge an attacher for costs arising from the correction of other attachers' safety violations.

- When a utility performs work on its poles (including pole replacements) and that work is not necessary to comply with all applicable laws and the NESC, the utility may only charge the attacher the difference between (i) the costs of such work including any specific costs to provide space on the poles for the attacher to make its attachment on the

poles; and (ii) the costs of such work if the attacher were not making an attachment to the poles.

The first point was set forth in *Knology Inc., v. Georgia Power Company,* Memorandum Opinion and Order, 18 FCC Rcd 24615 (2003). In that case, the Commission expressly stated that "it is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations." The second point is a matter of simple common sense. In fact, any other approach would be analogous to allowing an apartment complex owner to charge the newest tenant for the entire cost of an upgraded air conditioning system for the building.

The Commission needs to include both of these bullet points in its rules because utilities continually harm broadband deployment by ignoring them. Utilities should follow the *Knology* holding, but the record makes it clear that they do not – and they will not until the first bullet point becomes part of the Commission's rules. In fact, both of these points should be expressly stated in the Commission's rules, or broadband deployment will continue to be undermined.

This notice is being electronically filed with the Commission.

Respectfully submitted,

Alan G. Fishel

cc: Zac Katz
Angela Kronenberg
Christine Kurth
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