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November 19, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

Re: Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Local Exchange Carriers, WC Dkt. No. 04-313, CC Dkt. No. 01-338.

Dear Ms. Dortch:

Cbeyond Communications LLC (“Cbeyond”) writes this letter in response to BellSouth’s letter of November 8, 2004 alleging that “cable companies are actively competing in the high speed data market for business customers...,”¹ and therefore the Commission “could not lawfully make a national finding of impairment for DS-1 and above loops and transport.” *Id.* at 13. BellSouth alleges that its conclusion regarding intermodal competition from cable is buttressed by the Commission’s findings in the recent *271 Forbearance Order*.²

BellSouth’s arguments misconstrue Commission precedent, present misleading and irrelevant facts, and should be dismissed. Cable modem services provided over coaxial cable connections, to the extent that they do provide competitive alternatives for businesses, only do so for those small businesses with unsophisticated requirements. Cable modem service is not a viable alternative for the majority of the telecommunications and data needs of the average business customer. To the extent that cable companies deploy *fiber* loops at retail, they are just as reliant as other CLECs on the ILECs’ networks to serve the market. Finally, the cursory evidence presented by BellSouth regarding cable’s wholesale fiber offerings is both insignificant in scope and irrelevant to the impairment analysis.

¹ See Letter of Jonathan Banks, VP Executive and Federal Regulatory Affairs, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-313 *et al.*, at 1 (filed Nov. 8, 2004) (“*BellSouth Letter*”).

² See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*, *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, WC Dkt. Nos. 01-338 *et al.* (rel. Oct. 27, 2004) (“*271 Forbearance Order*”).

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First, BellSouth's reading of the *271 Forbearance Order* is highly misleading. BellSouth argues that the Commission recognized in that order that cable companies are successfully competing for large and small business customers. See *BellSouth Letter* at 3. But BellSouth fails to provide the context for the Commission's forbearance decision. While it is true that cable competition for some business customers was part of the rationale for lifting 271 requirements for broadband elements, the Commission only granted forbearance because section 251 unbundling requirements were still in effect. BellSouth selectively quotes footnote 68 of the order only to admit that evidence of cable competition for business customers is "not as powerful as [for] residential customers."³ In fact, the full sentence reads as follows: "*Because competitive LECs can still obtain access to network elements under section 251 to serve business customers, and because of actual and potential intermodal competition from other services, we find that forbearance from section 271 is warranted, notwithstanding that the evidence regarding cable competition for business customers is not as powerful as residential customers.*" *271 Forbearance Order* at n.68. (emphasis added) It is therefore clearly erroneous for BellSouth to rely on the *271 Forbearance Order* for the proposition that the Commission believes cable competition is sufficient to eliminate fiber unbundling.

Second, apparently recognizing the weakness of its precedential argument, BellSouth proffers its own "evidence" of competition between cable companies and wireline phone companies. However, BellSouth's evidence improperly conflates asymmetrical, relatively low bandwidth Hybrid Fiber Coax ("HFC") services provided over the cable companies' own infrastructure with higher capacity loops and transport which the cable companies can provide over their own facilities only in very limited circumstances.

For example, BellSouth states that Time Warner Cable's ("TWC") Road Runner service offerings range from 1MB/256k "to scalable bandwidths of over 1 Gbps for enterprise class customers." *BellSouth Letter* at 2. BellSouth glosses over the fact that the 1MB/256k product is delivered *via* HFC facilities, while the higher bandwidth services are delivered *via* fiber. Capacities up to 1 Gbps can likely only be provided via "fiber connectivity" through TWC's "Dedicated Access Solutions" for "enterprises."⁴ On the one hand, HFC services are unsuitable for all but the most unsophisticated applications while, on the other hand, cable companies face the exact same barriers as other CLECs in deploying fiber transmission facilities. Indeed, cable companies must, like any CLEC, purchase ILEC fiber transmission if they wish to serve a large portion of the enterprise customer segment in those cities where they have a presence.

BellSouth offers no new information to indicate that cable companies' HFC offerings are suitable for sophisticated business applications that many business customers demand. Nor does BellSouth refute the fact that cable modem services are not widely available to businesses. For example, BellSouth states that "roughly 25 percent" of businesses already have a cable drop and Cox

³ *BellSouth Letter* at 3 (quoting *271 Forbearance Order* at n.68).

⁴ http://www.rrbiz.com/RoadRunner/sec_enterprise.asp?TRACKID=&CID=17&DID=22.

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specifically expects “to reach more than 25% of its businesses within its franchise.” *BellSouth Letter* at 5-6. Penetration of this very small proportion of the overall market does not make HFC a viable intermodal competitor to the ILEC’s nearly ubiquitous fiber networks. Moreover, since business customers are unlikely to subscribe to video service, any future network expansion could only be justified on the basis of providing data, and to a limited extent, phone services.⁵

Even if HFC networks could somehow achieve the vast scope of the ILECs’ fiber networks, the characteristics of cable modem service dictate that it cannot serve as a replacement for DS1 or higher capacity fiber-based service. The inherently limited upstream capacity⁶ of cable modem service, HFC’s shared architecture that can lead to service slowdowns and security concerns,⁷ and the absence of other features demanded by most business customers make cable modem service unsuitable for much of the business market.⁸ In fact, 75 percent of businesses subscribing to cable modem service receive the residential version,⁹ demonstrating that either the alleged “business centric” features of the business product are not compelling or have not been deployed. Moreover, because HFC networks are shared, Cox places bandwidth limitations on their business users.¹⁰ This kind of use restriction would be unacceptable to most business customers who require a predicable and stable level of bandwidth. All of these factors make cable modem service unattractive to most large and sophisticated

⁵ See Letter from David L. Lawson, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-338 *et al.*, at 7 (filed May 26, 2004).

⁶ Because of the manner in which they were constructed, the bandwidth efficiency in cable networks’ upstream path is much lower than the downstream path. See Richard A. Chandler *et. al.*, THE TECHNOLOGY AND ECONOMICS OF CROSS-PLATFORM COMPETITION IN LOCAL TELECOMMUNICATIONS MARKETS, HAI Consulting, at 35 (2002) attachment A to Comments of WorldCom, Inc., CC Dkt. Nos. 01-338 *et. al.*, at 37 (filed Apr. 5, 2004). Offering services similar to a symmetrical T-1 would “quickly exhaust the upstream capacity of even an upgraded cable network.” *Id.* at 36.

⁷ See James Michael Steward, *Facing the security risks of cable modems*, TECHREPUBLIC, July 8, 2002, available at <http://insight.zdnet.co.uk/hardware/servers/0,39020445,2118716,00.htm>.

⁸ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978, ¶ 129 (2003) (“*Triennial Review Order*”), *vacated in part, United States Telecomm. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA IP*”), *cert. denied* 2004 U.S. LEXIS 6711 (“Large enterprises demand extensive, sophisticated packages of services. Reliability of service is essential to these customers, and they often expect guarantees of service quality. The services they might purchase include an internal voice and data network, local, long distance, and international POTS service to one or multiple locations, provisioning and maintenance of a data network such as ATM, frame relay or X.25, and customized billing.”).

⁹ See Letter of David L. Lawson, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-338, *et al.*, at 4-5 (filed Feb. 4, 2003).

¹⁰ See <http://www.coxbusiness.com/AcceptableUsePolicy.pdf> at 1. Cox Business Services’ “Acceptable Use Policies” indicates that the “Customer may not use the Services in a manner that places a disproportionate burden on the network or impairs the Service received by other Customers.” *Id.* Similarly, Comcast notes in its “High-Speed Internet for Business Acceptable Use Policy,” that “You must ensure that your activity... does not improperly restrict, inhibit, disrupt, degrade or impede any other user’s use of the Service, nor represent (in the sole judgment of Comcast), an unusually large burden on the network.” <http://work.comcast.net/legal/aup.asp>.

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businesses.¹¹ As the Commission recently confirmed: “[c]able modem service is primarily residential service, but may also include some small business service.”¹²

Cbeyond’s own experience indicates that cable modem service and fiber-based services do not compete with each other. Cbeyond provisions its service offering of packetized IP-based local voice, long distance voice and high speed internet access over DS-1 connections to small business customers. Of its total customer base, [proprietary begin] [proprietary end] of Cbeyond’s customers are provisioned with [proprietary begin] [proprietary end] telephone numbers, [proprietary begin] [proprietary end] are provisioned with [proprietary begin] [proprietary end] telephone numbers and [proprietary begin] [proprietary end] are provisioned with [proprietary begin] [proprietary end] telephone numbers from Cbeyond. Businesses that subscribe to Cbeyond’s popular “base-package” have an average of [proprietary begin] [proprietary end] employees. These are the kinds of small business customers that BellSouth alleges are the most receptive to cable modem offerings. However, from the perspective of these small businesses, cable modem service is no substitute for the service Cbeyond provides over DS1 connections. Indeed, in all of Cbeyond’s markets, [proprietary begin] [proprietary end] customers have ported telephone numbers from Cbeyond to a cable company,¹³ while [proprietary begin] [proprietary end] into Cbeyond have come from cable companies.¹⁴

More fundamentally, this lack of porting coupled with the dramatic divergence between pricing of cable modem and fiber-based services clearly indicates that they are in different product markets.¹⁵ For example, Cablevision’s asymmetrical Business Class Optimum Online cable modem service sells for \$109.95 per month,¹⁶ while Cbeyond generates an average of \$500 per month from its 5-line DS-1

¹¹ BellSouth resurrects the ILEC’s hoary chestnut that 41% of enterprises are using cable modem services for “some high-capacity services.” *BellSouth Letter* at 4. There is no indication of the extent to which these enterprises are using cable modem service. To use this fact to show that enterprises are using cable modem service as a replacement for DS1 or DS3 services would be equivalent of asserting that since 41% of consumers use wireless phones for “some” of their voice services, DS0 loops should be removed from unbundling. The Commission has rejected that argument in the wireless context and should do so here as well. Cable modem service is, for customers with sophisticated needs, at most a compliment, not a replacement, for DS1 or DS3 services.

¹² *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, FCC 04-208, at 14 (rel. Sept. 9, 2004).

¹³ [proprietary begin] [proprietary end] customers has returned to Cbeyond service after moving out of the cable company serving area.

¹⁴ Even this number overestimates the interchangeability of the services, because half of these ports were for an add-on product to a business package to provide phone service to a business customer’s home.

¹⁵ See 3A PHILLIP E. AREEDA, HERBERT HOVENKAMP AND JOHN SOLOW, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 561 (2d ed. 2002) (“To have separate markets, one must find that a significant price increase beyond the competitive level in the *A* price would *neither* induce customers of *A* to buy *B* instead, nor induce *B* producers to make *A*.”) (emphasis in original).

¹⁶ See http://www.optimum.com/index.jhtml?pageType=pricing_bcool.

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“base-package,” ordered by 88% of its customers. Similarly, Nuvox asserts that an average DS-1 generates between \$500 and \$700 per month in revenue.¹⁷ If cable modem service met the needs of Cbeyond’s customer base, Cbeyond would have long been forced into bankruptcy at these price differentials. Yet, Cbeyond is currently EBITDA positive and is adding new customers every day.

Businesses unsatisfied with cable’s HFC offering that wish to continue to receive transmission service from cable companies must turn to the cable companies’ fiber offerings. While BellSouth notes that many cable companies are offering high-capacity service over fiber loops, it is simply untrue that they are providing these services exclusively over their “own network facilities.” *BellSouth Letter* at 13. Indeed, BellSouth presents no evidence to back up this conclusion. This is unsurprising since cable companies would face the exact same barriers as other CLECs when attempting to serve new customers with fiber loops.

Hurdles to facilities construction include: (1) obtaining access to public rights-of-way; (2) obtaining access to buildings on reasonable terms and conditions in circumstances in which building owners have no duty and little incentive to provide such access; 3) convincing customers to wait out the delay (lasting anywhere from six to twelve months or even longer) associated with constructing new loops; (4) generating enough revenue from a particular location over a long enough period of time (usually requiring a long-term commitment from the customer) to make loop construction efficient; and (5) ensuring that the service provider can meet the telecommunications needs of the business customer at all of its locations (not just the location at which loop construction is efficient, which businesses increasing demand from their carriers).

There is no reason to believe cable companies would have an easier time surmounting these entry barriers than a wireline CLEC would. While both cable companies and CLECs have some local fiber transport facilities, this fact says nothing about their ability to serve individual customers. Just as CLECs routinely purchase ILEC facilities as special access or UNEs, so must cable companies if they wish to effectively serve markets they have entered with fiber-based services.¹⁸

Indeed, there is ample evidence that where cable companies cannot economically justify fiber construction or where such construction is not feasible, they resell ILEC fiber loops. For example, Lightpath, Cablevision’s CLEC subsidiary, has explained that “[a]lthough Lightpath is a facilities-based provider, Lightpath relies on special access lines from incumbent LEC facilities, namely

¹⁷ See Nuvox Comments, WC Dkt. Nos. 04-313 *et al.*, at 3 (filed Oct. 4, 2004). The importance of symmetrical service to many business users is underlined by Conversent, which notes that business customers are willing to pay 3 times more for Conversent symmetrical DSL service than Verizon’s ADSL offering. See Reply Comments of Conversent Communications LLC, CC Dkt. Nos. 01-338 *et al.*, ex. 1, Declaration of Robert J. Shanahan ¶ 17 (filed Jul. 17, 2002).

¹⁸ Without ILEC facilities, cable companies would, like CLECs, only be able to service a fraction of the market. As Verizon notes, CLECs service over half a million buildings, yet only have their own fiber in 32,000. See Verizon *ex parte* presentation, WC Dkt. Nos. 04-313 *et al.*, at 6 (filed Nov. 12, 2004).

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Verizon, to supplement its service footprint and provide services to its existing and new customers.”¹⁹ Although Cox offers DSx and OCn level services in Omaha, many of these circuits are purchased from Qwest.²⁰ Even in Manhattan, one of the areas of highest competitive fiber deployment in the country, TWC has only built its fiber network to neighborhood nodes.²¹ When TWC seeks to provide fiber-based services to business customers, it would need to deploy new fiber and, in doing so, would face the obstacles outlined above. In light of these market realities, the FCC cannot assume that services other than cable modem service described on Cox’s or any other cable operator’s website are offered exclusively over their own facilities.

To the extent that wholesale transmission services are offered by cable companies, they are only provided if a carrier can commit to purchasing very high capacities of transport. Therefore, these wholesale offerings are irrelevant to the transport impairment analysis. Cox is the only cable company identified by BellSouth as offering wholesale loops and transport. However, to be eligible to purchase wholesale loops from Cox, a carrier must purchase sufficient capacity to aggregate an OC-12 worth of capacity at a particular Cox POP.²² Carriers, including Cbeyond, must aggregate hundreds of DS1 loops at an individual Cox POP, otherwise they are effectively ineligible to purchase either wholesale loops or transport from Cox. Moreover, at OC-12 of capacity and above, the Commission has held that carriers are not impaired without access to unbundled transport, and therefore Cox’s limited offering only reinforces that the Commission’s 12 DS3 cut-off for transport was correct.²³ In addition, Cox’s wholesale loop and transport service is only available in very limited locations and is not available at all in any of Cbeyond’s markets. Therefore, the cursory evidence provided by BellSouth regarding cable’s wholesale fiber offerings should be dismissed as irrelevant to impairment for either loops or transport.

¹⁹ Letter from Cherie R. Kiser and Lisa N. Anderson, Attorneys for Cablevision Lightpath, Inc. to Magalie Roman Salas, Secretary, FCC, CC Dkt. No. 01-321 at 1-2 (filed Jan. 22, 2002).

²⁰ A discussion with Cox’s Omaha Carrier Access sales representative indicated that many of Cox’s fiber loops are purchased from Qwest.

²¹ See <http://www3.twnyc.com/NASApp/CS/ContentServer?pagename=twnyc/newbusiness&mysect=newbusiness/privatenetwork> (“The network is made up of hub sites, which are interconnected with a fiber back bone. These hub sites are in turn connected by fiber rings to Nodes housed on each city block, servicing one or two city blocks or possibly single buildings. Last mile connectivity to the typical user is via coaxial cable runs which terminate at the node.”).

²² See *BellSouth Letter* at 8 (“Carrier Interconnection Circuits connect the Cox POP to your POP and are available in OC-12 and OC-48 bandwidths. Customer End Loops connect your customer’s office or facility and are available in DS-1, DS-3, OC-3 and OC-12 bandwidths.”) (internal cites omitted).

²³ See *Triennial Review Order* ¶ 388. It is unsurprising that Cox will only wholesale high capacity transport since its network was designed to carry large amounts of programming to local nodes, and it was not designed to channelize high capacity transport circuits to permit wholesale access to other carriers. It is apparently not cost effective to reconfigure Cox’s network and install channelizing equipment to provide lower capacity transport. If other cable companies chose to offer wholesale services, it seems likely that they would encounter similar problems.

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As the forgoing clearly establishes, cable operators are only able to offer relatively unsophisticated services over their own HFC networks. The business customers that rely on DS1 and DS3-based services demand advanced services that cable modem services cannot provide. To the extent that cable companies provide such services they appear to do so over newly constructed fiber. Yet cable companies are in the exact same position as wireline CLECs when seeking to deploy such facilities. Cable's limited presence in the market should carry no special weight in the impairment analysis. Therefore, BellSouth's assertion of "cable's formidable competitive offerings to business customers" should be dismissed.

Sincerely,

/s/

Thomas Jones

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