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December 8, 2004

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

Re: Ex Parte Presentation in *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

BellSouth Telecommunications, Inc. ("BellSouth") submits this ex parte letter in response to the November 19, 2004 letter of Cbeyond Communications LLC ("Cbeyond"),[1] as well as the November 22, 2004 letter of NuVox, Inc.[2] Specifically, BellSouth wishes to respond to three erroneous arguments made in the *Cbeyond ex parte*.

1. Cbeyond states that cable companies' widely available hybrid fiber coax ("HFC") infrastructure is physically incapable of providing upstream data speeds comparable to those of wireline provided DS1 services and that cable's HFC infrastructure is capable of serving only the smallest business customers requiring the least sophisticated data services.[3] Indeed, Cbeyond accuses BellSouth of attempting to

[1] Ex parte letter from Thomas Jones, counsel for Cebyond, to Marlene H. Dortch, Secretary, FCC (November 19, 2004) ("*Cebyond ex parte*").
[2] Ex parte letter from Michael H. Pryor, Counsel to NuVox Communications, Inc., to Marlene H. Dortch, Secretary, FCC (November 22, 2004) ("*NuVox ex parte*")
[3] *Cbeyond ex parte* at p. 3: "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."

confuse the speeds available over cable's HFC infrastructure with those of services over cable's fiber facilities which Cbeyond baldly asserts are much more limited in their geographic availability.[4]

A review of the cable company offerings cited by BellSouth in its November 8, 2004 *ex parte*, however, proves that the high-speed services provided by cable companies over their widely available HFC infrastructure are equivalent to DS1 level services,[5] which the FCC has previously defined as being capable of providing 1.544 Mbps symmetrical service.[6]

In stark contrast to Cbeyond's claims, cable companies are routinely offering asymmetrical business class high-speed service over their HFC facilities with ***upstream*** speeds at or above 1.544 Mbps. For instance, Time Warner Cable's Road Runner Business Class services utilize its "robust hybrid fiber-coaxial network to deliver high speed Internet access to your small or medium-sized business."[7] Time Warner Cable offers no less than 7 different service speeds over its HFC facilities, including a symmetrical 1.5 Mbps service, as well as an asymmetrical 4 Mbps Downstream/2 Mbps Upstream service level, all of which Time Warner Cable is offering in direct competition to wireline DS1 level services.[8] Thus, the advertised speeds of Time Warner Cable's HFC services are comparable or superior to Cbeyond's own "BeyondVoice I" and "BeyondVoice II" service packages that Cbeyond claims are able to serve business customers with as many as 100 employees.[9]

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[4] *Id* at p. 4: "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."

[5] *See* Ex parte letter from Jonathan Banks, Vice President of Executive and Federal Regulatory Affairs for BellSouth, to Marlene H. Dortch, Secretary, FCC (November 8, 2004) ("*Nov. 8 ex parte*")

[6] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, n. 634 (rel. Aug. 21, 2003) ("A DS1 is a 1.544 Mbps first-level signal in the digital transmission hierarchy. ... We note that throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. ... We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.").

[7] http://www.twcs.net

[8] http://www.twcs.net/products/access.php

[9] http://www.cbeyond.com/business/packages.htm

Similarly, Cox Communications offers its Cox Business Internet service over its "widely available hybrid fiber coax (HFC) infrastructure" with downstream bandwidth up to 3 Mbps providing "equivalent data transfer speed of more expensive T-1 connections."[10] Thus, Cox is offering business class services over its HFC infrastructure at speeds that are comparable to Cbeyond's own offering of an "integrated package of high-speed T-1 Internet access . . . ."[11]

Further, while Cbeyond denigrates cable's HFC capabilities, most of Cbeyond's customers appear to fall within the small business customer segment of the market that even Cbeyond admits HFC facilities are capable of serving. Moreover, Cbeyond's data regarding telephone numbers ported to cable proves nothing more than that Cbeyond enjoys good customer retention. Similar porting data from cable companies might show that cable enjoys a comparable level of customer retention.

2. Cbeyond is equally wrong in its claim that cable companies are not offering service over their own facilities.[12] To the contrary, cable companies seek to separate their offerings in the marketplace from those of companies such as Cbeyond by touting the fact that they provide services to business customers over their own network in order to ensure the quality and reliability of their services:

> "In plain English: our solid foundation of advanced technology ensures a reliable and stable Internet access connection for your business."[13]
>
> "What's more, by owning and maintaining our network, we are wholly accountable, offering the simplicity and security of single-provider service."[14]
>
> "Through National Programs, high-speed Internet solutions serve every teleworker and branch office in the enterprise over a single network, its backbone wholly owned by Time Warner Cable."[15]

Moreover, cable companies are actively expanding their footprints to pass more small, medium and enterprise business customers within their service territory. For instance, Cox has been continuously upgrading and expanding its existing infrastructure in order to offer its "Full Service Network" to customers of all types and sizes,

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[10] http://www.coxbusinessmga.com/cbi.html

[11] http://www.cbeyond.com/business/packages.htm

[12] *Cbeyond ex parte* at p. 7: "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.'"

[13] Cox Business Internet, http://www.coxbusinessmga.com/cbi.html

[14] Cox Carrier Services, http://www.coxbusiness.com/carrierservices_general.asp

[15] Time Warner Cable National Programs, http://rrbizcentx.com/tabNationalprograms.html

including "Large Business Customers".[16] Similarly, Time Warner Cable appears eager to extend facilities to new buildings where tenants express an interest in receiving its services. If Time Warner Cable does not currently have facilities in a particular building, its "construction department will do a survey to determine the serviceability."[17]

These cable companies choose to differentiate themselves and their services in the competitive marketplace from those other companies that decide merely to resell the services of others. In so doing, these cable companies prove that facilities-based, inter-modal competition with wireline-provided high-capacity loops and transport is not only possible, but a market reality.

3. Finally, BellSouth's reading of the *271 Forbearance Order* is neither "misleading" nor "erroneous."[18] In that Order, the Commission *did recognize* that cable companies are successfully competing for business customers of all sizes: "The record demonstrates that cable operators have had success in acquiring not only residential customers, but increasingly large business customers as well."[19] Further, the Commission *did not require* the existence of an active wholesale market as a prerequisite for forbearance due to the competitive conditions existing in the "downstream retail broadband market."[20] The Commission concluded that the relatively modest beneficial impact of section 271 unbundling was "outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted."[21]

The Commission's same analysis applies to the issue of whether competitive LECs are impaired without access to high capacity loops and transport. The existence of widespread inter-modal alternatives necessitates a finding of no impairment, regardless of the impact that such a finding has on any particular company or resale business model.

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[16] *See* Cox Communications, *Broadband Platforms, Technology and the Last Mile*, Carrington Phillip, Vice President, April 29, 2003, http://www.neca.org/media/CarringtonPhillip.pdf

[17] http://www.rrbusiness.com/faqs.asp

[18] *See* Cbeyond *ex parte* at p. 4.

[19] *271 Forbearance Order* at ¶ 22.

[20] *Id.* at ¶ 21.

[21] *Id.*

The mere fact that the Commission sought to minimize any negative impact of its *271 Forbearance Order* by noting that "competitive LECs can still obtain access to network elements under section 251 to serve business customers" was not, as Cbeyond and NuVox suggest, tantamount to etching existing unbundling obligations in stone. Indeed, their Cbeyond's strained reading of the Commission's decision ultimately dissolves into a circuitous tail-chasing exercise meant to obfuscate the actual issue that the Commission must consider and decide – whether competitive LECs are impaired on a nationwide basis without access to ILEC-provided high capacity loops and transport. BellSouth respectfully represents that no such nation-wide blanket unbundling regime is judicially defensible given the extent of *real* facilities-based competition occurring in the downstream retail broadband market.

Sincerely,

Jon Banks

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