

March 28, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th St. S.W.
Washington D.C. 20554

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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:

On behalf of Cbeyond Communications, LLC, ("Cbeyond") we have enclosed for filing, pursuant to the protective order in the above referenced proceedings, two copies of the redacted version of a Petition for Reconsideration of the *Triennial Review Remand Order* as well as the attached declaration of Richard Batelaan of Cbeyond. The redacted version of these documents were also filed electronically today in those dockets.

Confidential versions of the enclosed Petition and declaration have also been sent to Gary Remondino of the Wireline Competition Bureau and were filed separately with the Secretary.

Please let us know if you have any questions.

/s/

Thomas Jones
Jonathan Lechter
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1875 K Street, N.W.,
Washington, D.C. 20006
(202) 303-1000

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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In the Matter of)	
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Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
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PETITION FOR RECONSIDERATION OF CBeyond COMMUNICATIONS

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PETITION FOR RECONSIDERATION

Cbeyond Communications LLC ("Cbeyond"), by its attorneys and pursuant to 47 C.F.R. § 1.429, hereby submits this Petition for Reconsideration of the Order on Remand in the above captioned dockets.¹ This petition seeks reconsideration of the Commission's holding in the *Triennial Review Remand Order* that a carrier may obtain no more than 10 DS1 UNE transport circuits on an interoffice route on which DS3 UNE transport is no longer available.

The Commission did not provide a lengthy explanation in *Triennial Review Remand Order* as to the basis for the 10 DS1 UNE transport cap. The brief discussion of this issue in the order indicates that the Commission justified setting the DS1 UNE transport cap at 10 DS1s solely on the basis of competitors' purported ability to "aggregate traffic" on a DS3 when they have accumulated more than 10 DS1 transport circuits on a route. *See id.* ¶ 128. In support of

¹ *See Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, WC Dkt. No. 04-313 et al., FCC 04-290 (rel. Feb. 4, 2005) ("Triennial Review Remand Order").*

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this proposition, the FCC cited to evidence in the record that, at approximately 10 DS1 UNEs, it is more expensive to purchase the 11th DS1 UNE transport facility than to purchase a single DS3 UNE transport facility.² Based on this cross-over analysis, the FCC concluded that the “DS3 impairment conclusions should apply” (*i.e.*, that no unbundled transport of any capacity should be available on that route) (*id.* ¶ 128), if a carrier wants to purchase more than 10 DS1s.

The Commission should reconsider its adoption of the 10 DS1 UNE transport cap. To begin with, the cap essentially precludes reliance on enhanced extended links (“EELs”) on transport routes for which UNE DS3 transport has been eliminated. EELs can only be efficiently utilized as combinations of DS1 loops and transport. By limiting the number of UNE DS1 transport circuits to 10 on a route on which DS3 transport has been eliminated, the FCC has effectively limited competitors relying on EELs to 10 customers per wire center connected to such delisted DS3 transport routes. Accordingly, the cap places a severe and artificial limit on the extent to which CLECs like Cbeyond can provide competitive alternatives to customers located in sparsely populated areas, such as Cartersville and Newnan Georgia and Allen Texas, that can only be served efficiently via EELs. Moreover, given the fact that the Commission did not even mention the consequences for EEL-based competition in its discussion of the DS1 UNE transport cap, it is not clear that it accounted for these consequences. There is therefore a particularly strong justification for eliminating or altering the cap in the manner described below where the transport facility is utilized as part of an EEL facility.

² See *id.* n. 358 (“See, e.g., Mountain Telecommunications Comments at 5-6 (explaining that in Arizona, an average 13 mile [UNE] DS1 transport link costs \$48.21 per month while an average 13 mile [UNE] DS3 transport link costs \$425.70, creating a cut over point at 8.83 DS1 channels); Integra Comments at 36 & Table 9 (based on average DS1 and DS3 UNE transport pricing in Qwest territory in Oregon, “it makes economic sense for Integra to purchase a DS-3” . . . “where 8 DS-1s are needed”); Lightship Gawlick Decl. at paras. 2, 13 & Attach. 1 (claiming that a 10.37 cut over point results from the average DS1 and DS3 UNE transport prices provided by Lightship which characterizes the data set as “a representative set of interoffice transport lines in our states,” which include Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.”).”).

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Indeed, the Commission's justification for the 10 DS1 UNE transport cap is fatally flawed. It may be true that the cost of a DS3 UNE transport circuit is lower than 11 DS1 UNE transport facilities on a route, but this fact has nothing to do with "impairment" or the wisdom of setting the DS1 transport cap at 10. If a carrier can purchase no more than 10 DS1s on routes where DS3 unbundling is not permitted, it will be forced to purchase the DS3 either as special access (not as a UNE) or to acquire transport from a non-ILEC source (either by self-deploying the facility or by acquiring it from a non-ILEC wholesaler). Given the Commission's holding that special access cannot be considered a substitute for UNEs for purposes of impairment in the provision of local service (*see id.* ¶ 64), the cross-over analysis must account for all of the costs associated with reliance on non-ILEC DS3 transport. As explained in the attached declaration of Richard Batelaan, those costs include, at the very least, costs associated with the deployment of a collocation cage, ILEC charges for moving loops from an ILEC multiplexer to a CLEC collocated multiplexing facility, and the cost of non-ILEC transport.

First, in order to utilize non-ILEC transport facilities, a competitor must deploy a collocation facility. Yet these collocation costs were clearly not contemplated by Commission when it fashioned its DS1 UNE cap. Collocation permits concentration of existing circuits so that the overall number of DS3 circuits necessary to provide service decreases (as compared to the number necessary in a UNE configuration without a collocation), thereby increasing efficiencies and lowering monthly recurring costs. However, the collocation process adds additional time and substantial up-front expenses. For example, Cbeyond's average collocation cost per wire center is [proprietary begin] [proprietary end] in Georgia. *See* Batelaan Declaration ¶ 9. These costs vary by state and by ILEC.

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Second, a CLEC that must rely on non-ILEC transport must pay the ILEC to move loops serving the CLEC's customers from ILEC multiplexing facilities to collocated CLEC multiplexing facilities. Yet, the Commission also failed to account for the substantial and onerous "conversion" costs that the ILECs levy on CLECs for performing this task. What is really a simple movement of wires from one spot in the ILEC's CO to another, is charged at, conservatively \$5,000 per DS3 equivalent of capacity. In fact, in Illinois, SBC charges \$6,500 per DS3 of capacity converted. *See* Batelaan Declaration ¶ 8. These charges bear no relation to the ILECs' costs and substantially reduce the ability of the CLEC to move away from a UNE regime in those markets where it already has facilities. Nevertheless, they are a critical cost component in a realistic cross-over analysis.

Compounding these costs is the ILECs' foot dragging in both moving circuits to CLEC collocation facilities as well as collocation construction. For example, in one state, it took Cbeyond [proprietary begin] [proprietary end] to convert DS1 transport circuits to 10 DS3 collocation multiplexers after an additional [proprietary begin] [proprietary end] to construct and equip the collocations. Without a completed collocation and the ability to concentrate its circuits, Cbeyond was forced to pay for many additional circuits that would have been otherwise eliminated. *See* Batelaan Declaration ¶ 10. It is not surprising then, that ILECs delay constructing a collocation and converting circuits since they have a clear incentive to maximize their special access revenue.

Third, a CLEC must obtain transport from non-ILECs at commercial, not TELRIC based rates. The dramatic increase in costs that results from these changes can be seen in the following example. While the monthly recurring cost for a DS1 UNE transport circuit in Georgia is \$38 (or \$380 for 10 DS1 circuits), replacing those DS1 UNEs with DS3 transport purchased from

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even the least expensive non-ILEC wholesaler operating in Cbeyond's markets costs an average of [proprietary begin] [proprietary end] per month plus hundreds of dollars in one-time non-recurring costs. Therefore, it would cost Cbeyond over additional [proprietary begin] [proprietary end] to add the 11th DS1 of capacity. See Batelaan Declaration ¶ 6.

Based on these costs, Richard Batelaan conducted a "cross-over" analysis to determine the point at which it is efficient for Cbeyond to move from DS1 UNEs to DS3 non-ILEC circuits with a collocation. Based on that analysis, Mr. Batelaan concluded that the cross over point is 435 DS1s in a wire center in which Cbeyond has already ordered unbundled loops and transport and 194 DS1s in a wire center in which it has not yet ordered UNEs (and therefore conversion costs are avoided).³ See Batelaan Declaration ¶ 11.

The Commission should reconsider the DS1 UNE transport cap in light of this information. In particular, to ensure that the DS1 cap and cross-over point takes into account the CLECs' true costs, the Commission should adopt the following changes to the *Triennial Review Remand Order*. *First*, for wire centers in which a CLEC already has a presence and has already begun to order UNEs, set the DS1 UNE transport cap at 435 DS1s. Of course, mandated reductions in the unreasonable conversion charges would justify a lower cap. *Second*, for wire centers in which a CLEC does not yet have a presence, the DS1 cap should be set at 194 DS1s. To the extent that the Commission does not wish to make these changes for stand-alone point-to-

³ It should be noted that, even if the 10 DS1 cap were reasonable (which it is not), carriers cannot transition from DS1 EELs to an arrangement coupling DS1 UNE loops with DS3 special access circuits if the ILECs continue to deny requests to commingle circuits. SBC, BellSouth and Qwest have all delayed or denied outright requests for commingling despite their clear verbal and contractual commitments to Cbeyond to do so. Therefore, the Commission must, on reconsideration, mandate that the ILECs accept and provision orders for commingled circuits. Without such action, carriers cannot move away from their reliance on EELs once they reach the DS1 cap on a transport route.

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point UNE transport, it must either eliminate the cap for DS1 EELs or make the changes proposed herein for those facilities.

Respectfully submitted,

/s/ Thomas Jones

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ATTORNEYS FOR
CBeyond COMMUNICATIONS

March 28, 2005

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DECLARATION OF RICHARD BATELAAN

1. My name is Richard Batelaan. My business address is 320 interstate North Parkway, Suite 300, Atlanta, Georgia, 30339.
2. I am employed as the Chief Operating Officer (COO) by Cbeyond Communications, LLC ("Cbeyond"). In that capacity, I am responsible for all Network Operations, Field Operations, Provisioning, Service Activation, Network Planning, Customer Care and ILEC Relations for Cbeyond. Prior to joining Cbeyond, I served as COO at BroadRiver Communications where I led the Operations and Engineering teams in the launch of voice, internet, and virtual private network services. Before joining BroadRiver, I spent twelve years at BellSouth Corporation where I held various positions within BellSouth Telecommunications, BellSouth Business Systems, and BellSouth.net, including the positions of Chief Operations Officer and VP Operations for BellSouth.net, Director of Operations for Broadband Services deployment, and Director of Engineering for

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BellSouth's Internet Services deployment. I have also worked at Cisco Systems as an engineer.

3. Cbeyond is a facilities-based competitive local exchange carrier (CLEC), serving over 15,000 small and medium-sized business customers. Cbeyond's business customers range in size from those with 4 to those with 200 employees and those that use from 5 to 48 phone lines. The average Cbeyond customer is on the smaller end of this range, with only 9 employees and 7 business lines. Cbeyond provides service in five metropolitan areas: Atlanta, Dallas-Fort Worth, Houston, Denver and Chicago. Cbeyond's customers typically demand an integrated package of high quality telecommunications and data access services at a DS-1 level of capacity. Therefore, Cbeyond typically has purchased DS1 UNE loops and DS1 EELs to serve its customers. **[proprietary begin] [proprietary end]** of Cbeyond's DS1 circuits are provisioned as EELs.
4. The purpose of my Declaration is to demonstrate that the Commission's adoption a 10 DS-1 UNE transport cap on routes on which DS3 UNE transport has been eliminated does not reflect a cross-over analysis for efficient use of non-ILEC transport facilities. It is my understanding that the FCC relied solely on a comparison of the process for DS1 UNE transport and DS-3 UNE transport facilities for determining the 10 DS-1 UNE transport cap. As I explain herein, this analysis is inconsistent with the cross-over analysis that Cbeyond would perform to determine the point at which it becomes efficient for a CLEC to utilize non-ILEC DS3 transport (I focus here on purchasing at wholesale from a third party non-ILEC because that is a much less expensive alternative than self-deployment of transport by Cbeyond). Cbeyond's analysis requires consideration of

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numerous costs not accounted for by the FCC. These costs can only be recovered if Cbeyond can aggregate *several hundred* DS1s of capacity on a particular transport route.

5. Cbeyond has conducted two studies (one which assumes that Cbeyond has already ordered UNE loops and transport in a central office which must be converted to non-ILEC transport and the other study which assumes that Cbeyond has not yet ordered UNE transport from the ILEC in the central-office) to determine where the cost cross-over point occurs between the use of DS1 UNEs on one hand and non-ILEC wholesale DS3 transport on the other hand. Calculations were performed for each state where Cbeyond operates. The costs and therefore models differ slightly state-by-state. Cbeyond typically performs similar studies when entering a market to determine whether it is more efficient to purchase UNEs or employ DS3 circuits coupled with a collocation.
6. The major costs incurred in utilizing non-ILEC DS3 transport include 1) the monthly recurring costs of wholesale non-ILEC DS3 interoffice transport (which the model sets at **[proprietary begin] [proprietary end]**, the lowest available non-ILEC rate for two DS3s in Cbeyond's markets¹) and non-recurring costs of DS3 transport (a one time fee of **[proprietary begin] [proprietary end]** for two DS3s which again reflects the lowest available non-ILEC rate for two DS3s in Cbeyond's markets); 2) the costs of constructing a collocation cage and renting the collocation space; and 3) where Cbeyond has already purchased UNE loop and transport in a central office, the cost of "converting" UNE transport circuits to non-ILEC wholesale circuits. We compared these costs with the monthly charges for UNE DS1 transport circuits. For Cbeyond, those charges are \$38 in Georgia, \$36 in Texas, \$45 in Colorado and \$48 in Illinois.

¹ Cbeyond, like any CLEC moving to a collocation arrangement, would purchase a minimum of two DS3s to provide for redundancy and the ability to expand to meet demand.

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7. Savings from utilizing non-ILEC DS3 transport are achieved by “concentrating” the circuits in a collocation. Concentration essentially permits one DS3 to serve more than 28 DS1 loops, thereby increasing efficiency and reducing costs over the long-term. Because of the substantial up-front investment involved in building the collocation and converting the circuits, the models assume that there must be a **[proprietary begin]** **[proprietary end]** month payback before the cumulative savings exceed the cumulative cost. The models also assume that, once the collocation is established, the DS1 transport circuits will be converted to non-ILEC transport at a rate of **[proprietary begin]** **[proprietary end]**, with an annual incremental circuit growth rate of **[proprietary begin]** **[proprietary end]**.
8. These models are very conservative in that they do not include certain incremental capital expenditures and assume that the conversion cost is only \$5000 per DS3 equivalent when, in many cases, the conversion cost may be much higher. For example, in Illinois, the conversion cost is approximately \$6,500 per DS3 equivalent. These prices are set by rates in the ILECs’ interconnection agreements, yet are well in excess of any reasonable cost of providing the “conversion” service; conversion merely involves moving the circuits from the ILEC’s equipment to Cbeyond’s newly established collocation in the ILEC’s CO and updating the records to reflect this new arrangement.
9. Because of differing ILEC policies regarding, among other things, the reuse of abandoned collocation space, collocation costs vary substantially from state to state. For example, Cbeyond’s collocation costs per central office are approximately **[proprietary begin]** **[proprietary end]** in Georgia, **[proprietary begin]** **[proprietary end]** in Texas,

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[proprietary begin] [proprietary end] in Colorado and **[proprietary begin]**

[proprietary end] in Illinois. Collocation rents also vary substantially by state.

10. Cbeyond's models also assume substantial delays in both the conversion process and collocation builds. As noted previously, cost savings cannot be achieved until non-ILEC transport circuits can be eliminated through "concentration" at a collocation facility. In one market in which BellSouth operates, it took approximately **[proprietary begin]** **[proprietary end]** to construct the collocations and another **[proprietary begin]** **[proprietary end]** to "convert" the UNE transport to DS3 connections at the collocation. During this time, Cbeyond was unable to reduce its circuit demand through concentration and had to pay thousands of additional dollars to BellSouth. This experience may or may not be representative.
11. Because of these and other state-by-state variations, the cross-over point for both new build and existing build situations differs by state. DS1 UNE transport "crosses over," or is equal to, the total costs of DS3 non-ILEC wholesale (*i.e.*, the costs of collocation, conversion and non-ILEC circuits) at **[proprietary begin] [proprietary]** DS1 circuits in Georgia, **[proprietary begin] [proprietary end]** in Texas, **[proprietary begin]** **[proprietary end]** in Colorado and **[proprietary begin] [proprietary end]** in Illinois. The average for all states is 435 DS1 circuits. Assuming that Cbeyond does not yet have a presence and therefore does not need to undergo the conversion process, the average cross-over point is **[proprietary begin] [proprietary end]** circuits in Georgia, **[proprietary begin] [proprietary end]** in Texas, **[proprietary begin] [proprietary]** in Colorado and **[proprietary begin] [proprietary end]** in Illinois. The average for all states is 194 DS1 circuits.

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12. This concludes my Declaration.
13. Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: March 28, 2004.



Richard Batelaan, PE