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WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

EX PARTE OR LATE FILED

November 16, 2007

ORIGINAL

FILED/ACCEPTED
NOV 16 2007
Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: In the Matter of Petition of Verizon for Forbearance in Boston, New York, Philadelphia, Pittsburgh, Providence, Virginia Beach Statistical Areas, WC Docket No. 06-172

Dear Ms. Dortch:

On behalf of Time Warner Telecom Inc., One Communications Corp. and Cbeyond, Inc. please find enclosed two copies of a redacted version of an *ex parte* presentation filed today in the above referenced docket. Pursuant to the protective order in this proceeding, two copies of a confidential version of this presentation have been filed with Gary Remondino and one copy of a confidential version of this letter has been filed with the Secretary.

Please let us know if you have any questions with respect to this submission.

Respectfully submitted,

Thomas Jones
Jonathan Lechter

WILLKIE FARR & GALLAGHER LLP
ATTORNEYS FOR ONE COMMUNICATIONS,
CBEYOND, AND TIME WARNER TELECOM

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Washington, DC 20006

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VIA E-MAIL **_EX PARTE_**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

RE: WC Docket No. 06-172

Dear Ms. Dortch:

On November 15th, 2007 the undersigned and Jonathan Lechter of Willkie Farr & Gallagher LLP as well as Greg Kennan of One Communications Corp. and Julia Strow, outside consultant to Cbeyond, Inc., held separate meetings Ian Diller, legal advisor to Chairman Martin, John Hunter, Senior Legal Advisor to Commissioner McDowell, Scott Deutchman, legal advisor to Comissioner Copps and Chris Moore, legal advisor to Commisioner Tate. On November 16, 2007, the undersigned, Mr. Kennan and Ms. Strow met with Commissioner Adelstein and Scott Bergmann, Commissioner Adelstein's legal advisor.

The attached presentation formed the basis for the meetings.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this notice is being filed electronically in the above-referenced proceeding. Please contact me if you have any questions.

Respectfully submitted,

Thomas Jones

Counsel for Time Warner Telecom Inc., One Communications Corp. and Cbeyond, Inc.

cc: Commissioner Adelstein
John Hunter
Scott Bergmann
Scott Deutchman
Chris Moore
Ian Dillner

Enclosure

PRESENTATION OF ONE COMMUNICATIONS, CBEYOND AND TIME WARNER TELECOM

WC Dkt. No. 06-172

November 15 and 16, 2007

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WILLKIE FARR & GALLAGHE

In Past Orders, Forbearance From UNE Obligations Has Only Been Granted Where The Following Conditions Have Been Met

- **Retail Market Share:** Facilities-based competitors have captured a very substantia retail market share on an MSA-wide basis by providing services over their own loo facilities. There must be evidence that competitors have used their own loop facilities to provide all of the relevant services (DSO, DS1 and DS3s) in significant numbers.
- **Network Coverage:** At least one facilities-based retail competitor is "willing and able within a commercially reasonable time of providing" the full range of services that act as substitutes for the ILEC's to 75 percent of the end user locations in a wir center.
- **Wholesale Competition:** The ILEC is subject to sufficient competition from competitive wholesalers and other market pressures such that the ILEC has the incentive to offer loops and transport at wholesale on reasonable terms and conditions. Where such competition and market pressures are absent, the FCC has imposed a regulatory backstop, including rate regulation, to ensure a viable wholes market post-forbearance.

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The FCC has held that Cable Retail Market Share __and__ Network Coverage Benchmarks Must Be Met.

__Anchorage Order The Retail Market Share and Coverage Test *Are Conjunctive*__:

- "[W]e (i) examine the level of retail competition and the role of the wholesale marke in the study area to determine as a threshold matter whether the Anchorage study are is sufficiently competitive to support forbearance; (ii) examine the extent to which competitive facilities deployment is responsible for this level of competition…" *Anchorage Order* ¶ 26.
- "We believe it appropriate to grant forbearance relief only in wire center services are where a competitor has facilities coverage of at least 75 percent of the end user locations accessible from that wire center." *Anchorage Order* ¶ 31.

➢ **__GCI's Retail Market Share was Crucial to Forbearance from UNE Obligations:__**

- "Retail competition in the Anchorage study area is robust….GCI has captured [confidential] percent of the residential lines…GCI…has [confidential] percent of th voice grade equivalent business lines in the Anchorage study area." *Anchorage Orde* ¶ 28.

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'he UNE Forbearance Test Should Be Modified To ccount for Basic Differences In Product Markets

Retail Market Share. The FCC should separately analyze the level of retail market share achieved by facilities-based competitors in the provision of business DS0-based services, residential DS0-based services DS1-based services and DS3-based services (or close substitutes for such services).

Network Coverage. The FCC should separately analyze the level of network coverage achieved by facilities-based competitors to determine the extent to which such coverage meets the 75 percent test for business DS0-based services, residential DS0-based services, DS1-based and DS3-based services. For example, a prerequisite for obtaining forbearance for DS1 loops in a wire center should be a showing that a facilities-based carrier has achieved 75 percent network coverage for DS1 loops (or close substitutes for suc loops). Network coverage for one type of loop should not be used as the basis for forbearance from unbundling obligations applicable to a different kind of loop.

Wholesale Competition. The FCC should require that a facilities-based wholesale competitor offer the typ of service at issue (e.g., residential DS0-based services, business DS0-based services, DS1-based services o DS3-based services or close substitutes) to 75 percent of the end user locations in a wire center. For examp a prerequisite for obtaining forbearance for DS1 loops in a wire center should be a showing that a facilities-based wholesaler offers DS1 service (or a close substitute) at wholesale to 75 percent of the end user locatio in the wire center.

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There is no basis for Concluding That Cable Company Retail Market Shares Meet The Threshold Necessary for Forbearance

- **Time Warner Cable ("TWC") [proprietary begin]**

  [proprietary end]

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'here is no basis for Concluding That Cable Company *'etail Market Shares Meet The Threshold Necessary for* *'orbearance*

Comcast

- **Residential:** **[proprietary begin] [proprietary end]**
- **Business:** Comcast provided no data regarding its market share in the business market, asserting that its CDV phone product is generally not purchased by business customers. *See* Comcast Letter at 3 (Nov. 9, 2007).
  - "Comcast's actual number of business customers is relatively small. Indeec Comcast has not, to date, made any significant or sustained entry into the business market and enterprise markets." Comcast Comments at 5.
  - Comcast's limited business market penetration is unsurprising as Comcast only spent $31 million on cap ex for its commercial segment in 3Q 2007 an $26 million in 2Q 2006. It spent $1.461 billion and $1.045 billion on cap ex on its residential segment in those same two quarters. *See* Comcast Investor Presentations available at Comcast.com.

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There is no basis for Concluding That Cable Company Retail Market Shares Meet The Threshold Necessary for Forbearance

<u>Charter</u> [proprietary begin]

- **[proprietary end]**

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There is no basis for Concluding That Cable Company Retail Market Shares Meet The Threshold Necessary for Forbearance

RCN

- **[proprietary begin] [proprietary end]**

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Cable Companies Cannot Provide Substitutes for Services Demanded By Businesses "Passed" By Their Networks

As NCTA has explained (*see* NCTA Comments at 6-8) "The underlying Premise of Verizon's arguments—that a cable network that passes a particular area is capable of providing telephon service to all enterprise customers in that area does not reflect the reality of the marketplace."

- "First, as the Commission, DOJ and GAO have recognized, the economics of constructin last mile facilities to commercial buildings can be daunting. This is particularly true for cable networks, which have been designed primarily to serve residential customers and may not even pass office parks or other non-residential areas. Even when a cable networ does pass a commercial building, it may not be economically feasible for the cable operator to bring its facilities into the building."
- "Secondly, even where it is economically feasible for a cable operator to bring its faciliti into a commercial building, it will often face difficulties in making the necessary arrangements"
- "Finally, most cable operators have not achieved the scope of operations needed to serve large enterprise customers. As the Commission has recognized, these customers typicall have multiple locations throughout the country and often prefer to take service from a single company that can serve all these locations."

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Cable Companies Cannot Provide Substitutes for Services Demanded By Businesses "Passed" By Their Networks

- Time Warner Cable
  - **[proprietary begin] [proprietary end]**
- Cox
  - **[proprietary begin] [proprietary end]**
- Comcast
  - Indicates that it does not market services other than CDV that are "substitutes" for an of Verizon's service offerings. According to Comcast, CDV is marketed to and purchased primarily by residential customers and is equivalent to a DS0. *See* Comca Letter at 3 (Nov. 9, 2007).
- Charter
  - **[proprietary begin] [proprietary end]**
- Cablevision
  - Has not filed any data into the record.

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Cable Companies Cannot Provide Substitutes for Services Demanded By Businesses "Passed" By Their Networks

One Communications sells, among other things, single POTS lines to businesses, xDSL business broadband, and single and bonded DS1 services to businesses that integrate voice and data service over the same connection. One Communications serves the majority of its customers via DS0 UNE loops.

Based on its internal churn data, One Communications has **[proprietary begin] [proprietary end]** customers to cable companies in the six MSAs.

This churn data indicates that cable companies' competitive presence in the busines market is limited in these MSAs; this is true even for services that substitute for the DS0-based services that One Communications offers to most of its customers.

[proprietary begin] [proprietary end]

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Cable Companies Cannot Provide Substitutes for Services Demanded By Businesses "Passed" By Their Networks

- [proprietary begin] [proprietary end]

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Cable Companies Cannot Provide Substitutes for Services Demanded By Businesses "Passed" By Their Networks

[proprietary begin] [proprietary end]

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orbearance Is Not Justified Unless Competitors Can Provide Videspread Facilities-Based Wholesale Alternatives to Verizon

- There has been little if any evidence placed on the record of wholesale competition in the six MSAs, raising the threat of duopoly, particularly in t market for DS0-based services if forbearance is granted.
- Similarly, the FCC recognized the lack of wholesale competition in Anchorage and Omaha MSAs and acknowledged that a duopoly would not be in the public interest. *See Omaha Order* ¶ 67, *Anchorage Order* ¶ 30.
- The FCC predicted that a duopoly would not result in Omaha because Qwe would have the incentive post-forbearance to offer its facilities at wholesale on reasonable terms and conditions. *See Omaha Order* ¶ 71.

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Forbearance Is Not Justified Unless Competitors Can Provide Widespread Facilities-Based Wholesale Alternatives to Verizon

The FCC's Omaha prediction has not been borne out.

- Because Section 271 has no pricing standard, Qwest merely offered competitors its standard special access DS1 and DS3 rates post-forbearance. Qwest's "negotiated" QPP (DS0 plus switching) rates are nearly as high as McLeod's retail rates in many cases, placing McLeod in an untenable price squeeze. *See* McLeodUSA Letter, WC Dkt. No. 0 223 at 9 (Nov. 13, 2007).
- Qwest is subject to pricing flexibility in Omaha for channel terminations and interoffice transport, and its special access DS1 and DS3 rates in Omaha are ***higher*** than in those markets where UNEs are still available and which remain subject to price caps.
- If Qwest's incentives to provide wholesale services in Omaha were truly greater than its incentives in other markets, it would have offered rates ***lower*** than its generally available special access rates.

The FCC should not repeat its mistake.

- As a result, forbearance should only be granted if there is sufficient facilities-based wholesale competition in all relevant product markets to constrain Verizon's wholesale prices.

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