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VIA HAND DELIVERY

NOV 16 2009

November 16, 2009

Federal Communications Commission
Office of the Secretary

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

Re: Cbeyond Petition for Expedited Rulemaking and Request for Highly Confidential Treatment

Dear Ms. Dortch:

On behalf of Cbeyond, inc. ("Cbeyond"), please find enclosed for filing one original and four copies of the redacted version of Cbeyond's Petition for Expediting Rulemaking and accompanying Attachments. In the redacted version of the filing, the information in Attachments C and D for which Cbeyond seeks highly confidential treatment (*i.e.*, the information between the markings that state "[BEGIN HIGHLY CONFIDENTIAL]" and "[END HIGHLY CONFIDENTIAL]") has been redacted. Although only Attachments C and D contain highly confidential information that requires redaction, the entire filing has been labeled "REDACTED - FOR PUBLIC INSPECTION" at the top of each page for consistency.

Under separate cover, Cbeyond is also submitting for filing one original and four copies of the highly confidential version of Cbeyond's Petition for Expediting Rulemaking and accompanying Attachments. As discussed below, Cbeyond requests highly confidential treatment of certain information contained in Attachment C and all of the information contained in Attachment D. This information is contained between markings that state "[BEGIN HIGHLY CONFIDENTIAL]" and "[END HIGHLY CONFIDENTIAL]." Although only Attachment C and Attachment D contain highly confidential information, the entire filing has been labeled "HIGHLY CONFIDENTIAL - NOT FOR PUBLIC INSPECTION" at the top of each page in order to minimize the risk of inadvertent disclosure.

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Confidentiality Justification Pursuant to Sections 0.457 and 0.459 of the Commission's Rules

Cbeyond requests highly confidential treatment of the information being provided in Attachments C and D of the enclosed filing because this information is competitively sensitive and its disclosure would have a negative competitive impact on Cbeyond in the event that the information was made publicly available. Such information would not ordinarily be made available to the public and should be afforded confidential treatment under both Sections 0.457 and 0.459 of the Commission's Rules.

Request for Confidentiality under 47 C.F.R. § 0.457

Information contained in Attachments C and D of the enclosed filing is proprietary and confidential to Cbeyond because it is "commercial . . . information . . . not routinely available for public inspection." 47 C.F.R. § 0.457(d). It also constitutes "commercial" "data which would customarily be guarded from competitors." *Id.* § 0.457(d)(2). Accordingly, in the normal course of Commission practice, the information contained in Attachments C and D should be considered materials "not routinely available for public inspection." *Id.* § 0.457(d).

Request for Confidentiality under 47 C.F.R. § 0.459

As demonstrated below, information contained in Attachments C and D of the enclosed filing are also subject to the protection of Section 0.459 of the Commission's Rules. Pursuant to 47 C.F.R. § 0.459(b), Cbeyond provides the following statement of the reasons for withholding the materials from inspection:

- (1) Identification of the specific information for which confidential treatment is sought—Cbeyond requests that the specific information contained in columns numbered 4 through 7 in the table that constitutes Attachment C and all of the information contained in the bar graph that constitutes Attachment D be treated as highly confidential. This information is the number of Cbeyond addresses served, the number of Cbeyond addresses served by copper, the number of Cbeyond addresses served where copper is unavailable, and the number of Cbeyond addresses served by copper loops less than 15,000 feet in length in nine U.S. markets in which Cbeyond provides service.
- (2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission—The information contained in Attachments C and D is being submitted in connection with Cbeyond's Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, which has not yet been docketed.
- (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged; (4) Explanation of the degree to which the information concerns a service that is subject to competition; and (5) Explanation of how disclosure of the information could result in substantial competitive harm—This type of commercial data would generally not be subject to routine public inspection under Section 0.457(d) of the Commission's Rules, thereby demonstrating the Commission's understanding that the disclosure of such information would cause competitive harm. Public disclosure of the number of Cbeyond addresses served, the number of Cbeyond addresses served by copper, the number of Cbeyond addresses served where copper is unavailable, and the

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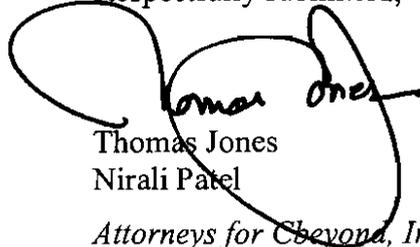
number of Cbeyond addresses served by copper loops less than 15,000 feet in length in nine U.S. markets in which Cbeyond provides service would cause Cbeyond substantial competitive harm by allowing its competitors to become aware of highly proprietary information regarding Cbeyond's operations.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure; and (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties—Cbeyond has treated and continues to treat the information contained in columns numbered 4 through 7 in the table that constitutes Attachment C and all of the information contained in the bar graph that constitutes Attachment D as highly confidential and has protected it from public disclosure to parties outside of the company.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure—At the present time, Cbeyond cannot determine a date on which this information should not be considered highly confidential because disclosure of such information would cause Cbeyond such competitive harm.

Please do not hesitate to contact me if you have any questions or concerns about this submission.

Respectfully submitted,



Thomas Jones
Nirali Patel
Attorneys for Cbeyond, Inc.

Enclosures

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Cbeyond, Inc. Petition for Expedited)
Rulemaking to Require Unbundling of) WC Docket No. 09-__
Hybrid, FTTH, and FTTC Loops)
Pursuant to 47 U.S.C. § 251(c)(3) of the Act)

PETITION FOR EXPEDITED RULEMAKING

WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, D.C. 20006

November 16, 2009

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Cbeyond, Inc. Petition for Expedited)
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Hybrid, FTTH, and FTTC Loops)
Pursuant to 47 U.S.C. § 251(c)(3) of the Act)

PETITION FOR EXPEDITED RULEMAKING

Pursuant to Section 1.401 of the Commission's Rules,¹ Cbeyond, Inc. ("Cbeyond"), through its undersigned attorneys, hereby submits this petition seeking adoption of rules requiring incumbent LECs to provide unbundled access, pursuant to Section 251(c)(3) of the Act,² to the packetized bandwidth of hybrid fiber-copper loops, fiber-to-the-home ("FTTH") loops, and fiber-to-the-curb ("FTTC") loops, at the same rates that incumbent LECs charge their own retail customers, for the purpose of serving small business customers.

I. INTRODUCTION AND SUMMARY

Despite the widespread assumption that the United States is pulling out of the depths of the "Great Recession," the unemployment rate in the U.S. continues to surge. In October, the rate of unemployment reached 10.2 percent, its highest level in 26 years.³ Moreover, the combined rate of unemployment and "underemployment," which takes into account those who

¹ 47 C.F.R. § 1.401.

² 47 U.S.C. § 251.

³ See, e.g., Peter S. Goodman, "U.S. Unemployment Rate Hits 10.2%, Highest in 26 Years," N.Y. TIMES, Nov. 7, 2009, available at <http://www.nytimes.com/2009/11/07/business/economy/07jobs.html?scp=2&sq=Unemployment&st=cse>.

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can only find part-time work and those who have given up searching for a job, reached an astonishing 17.5 percent in October.⁴ As the *New York Times* recently reported, this rate of underemployment is “almost certainly . . . at its highest level since the Great Depression.”⁵ It is no wonder, then, that President Obama has called job creation his “administration’s overriding focus.”⁶ Likewise, Chairman Genachowski has said that “[p]ursuing policies that promote job creation” is one of his top priorities.⁷

But designing policies to encourage job creation is extremely difficult. While some urge further expenditure on another round of fiscal stimulus, such an approach runs the risk of increasing already huge federal deficits. Moreover, the only long-term solution to unemployment is to establish the preconditions for private enterprise to create jobs by investing in the development of new and innovative goods and services.

Most of that investment will have to come from small businesses. The Small Business Administration estimates that businesses with less than 500 employees generated 64 percent of net new jobs over the past 15 years.⁸ Moreover, these businesses employ more than half of all

⁴ See David Leonhardt, “Broader Measure of U.S. Unemployment Stands at 17.5%,” N.Y. TIMES, Nov. 7, 2009, available at <http://www.nytimes.com/2009/11/07/business/economy/07econ.html?em>.

⁵ *Id.*

⁶ The White House, Office of the Press Secretary, “Remarks by the President during the meeting of the President’s Economic Recovery Advisory Board” (Nov. 2, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-during-meeting-presidents-economic-recovery-advisory-board>.

⁷ “Remarks of Chairman Julius Genachowski to the Staff of the Federal Communications Commission” (June 30, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf.

⁸ See Small Business Administration, Office of Advocacy, Frequently Asked Questions, at 1 (Updated September 2009), <http://www.sba.gov/advo/stats/sbfaq.pdf>.

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private sector employees, pay 44 percent of the total U.S. private payroll, and create more than half of the non-farm private GDP.⁹ Unfortunately, during this recession, small businesses have been especially hard hit. Based on data from ADP, Inc., 74 percent of the total non-farm private jobs lost between September and October 2009 were from businesses with less than 500 employees.¹⁰ Accordingly, as the President has recognized, we must “do whatever we can to help these businesses grow and thrive”¹¹ because “[o]ur economy as a whole can’t move ahead if small businesses . . . continue to fall behind.”¹²

Recent FCC policies have had a negative effect on the efficiency of small businesses in the U.S. Today, small businesses generally see no choice but to make do with relatively primitive IT applications. Efficiency-enhancing applications such as virtualized desktops, hosted digital image and file management, high-resolution video conferencing, broadcast/live video streaming, robust data protection, cloud-based backup, sophisticated video security systems, cloud computing and software as a service are tools that larger businesses use everyday and that small businesses could rely on to implement their business plans and create jobs. But such applications are generally unavailable to small businesses at reasonable prices. Although incumbent LECs have the capacity in their networks to deliver these services to many small

⁹ *Id.*

¹⁰ See ADP National Employment Report, at Table 1 (rel. Nov. 4, 2009), http://www.adpemploymentreport.com/pdf/FINAL_Report_October_09.pdf.

¹¹ The White House, Office of the Press Secretary, “Remarks by the President on Small Business Initiatives” (Oct. 21, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-small-business-initiatives-landover-md>.

¹² The White House, Office of the Press Secretary, “Weekly Address: President Obama Says Small Business Must be at the Forefront of the Recovery” (Oct. 24, 2009), *available at* <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-says-small-business-must-be-forefront-recovery>.

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businesses, they have chosen not to focus their resources on doing so. Applications providers like Cbeyond are ready to develop and deliver these “big business” applications to small businesses. But a series of FCC decisions over the past six years have allowed the incumbent LECs to refuse to provide competitors unbundled access to the loop bandwidth needed to provide new IT applications to businesses. Application providers must therefore make do with the limited bandwidth of T-1 circuits—bandwidth that enables them to provide only the most limited applications. Moreover, while access to unbundled conditioned copper loops enables competitors to provide high-bandwidth to end users via Ethernet over First Mile Copper (“EFMC”) technology, most small business customer locations are not served by copper loops suitable for this technology. As a result, small businesses have no choice but to try to use 20th-century business tools to create new jobs in a 21st-century global marketplace.

The FCC has the ability to address this problem in a way that is both simple and largely costless to both taxpayers and incumbent LECs. It can do so by requiring that incumbent LECs provide competitive applications providers such as Cbeyond with unbundled access under Section 251(c) to the packetized bandwidth of fiber and hybrid fiber-copper loops that reach small businesses today. Moreover, the incumbent LECs can charge competitors the same prices for this bandwidth that incumbent LECs charge their own retail customers.

If competitors are freed from the constraints of relying solely on old TDM-based T-1 technology and can instead utilize packetized loops, the benefits to small businesses and the U.S. economy will be very substantial. In the short term, Cbeyond and other applications providers will deliver existing big business applications to small businesses, with transformative effects. A small business could avoid incurring the expense of purchasing and maintaining computers and software that is obviated by virtualized desktops. It could avoid paying for expensive onsite data

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security and instead rely on carrier-provided solutions that are less costly and more robust. A small business could also diminish reliance on expensive and inefficient travel for in-person meetings and could rely instead on high-resolution video conferencing. The list goes on and on. Moreover, once increased bandwidth is available to applications providers and software developers, such entities will invest in innovation and job creation to develop new and even more sophisticated applications for small businesses. Thus, in the long run, ensuring that incumbent LECs provide competitors with increased bandwidth will create a virtuous cycle of investment, innovation and job creation that the country so desperately needs.

The FCC should adopt rules requiring incumbent LECs to provide unbundled access to the packetized bandwidth of hybrid loops, FTTH loops, and FTTC loops at retail rates for several additional reasons. The premise underlying the Commission's decision to eliminate unbundling of these elements—that doing so would remove disincentives to invest in next-generation broadband facilities and spur broadband deployment—has proven to be false. In fact, the experience in the U.S. and in other countries indicates that regulation of last mile incumbent LEC facilities does not deter investment and may in fact stimulate investment in certain cases. Moreover, because competitors are impaired in the absence of unbundled fiber and hybrid loops, the FCC's decision to deny those network elements to CLECs also failed to increase CLEC investment.

Accordingly, the Commission should end its misguided experiment in premature deregulation, and it should return to putting the available bandwidth in the hands of those who can drive broadband adoption and efficiencies in the small business sector. Every day that small businesses are denied these benefits is another day with diminished innovation and foregone job creation.

II. BACKGROUND

Section 251(c)(3) of the Telecommunications Act of 1996¹³ requires that incumbent LECs provide requesting telecommunications carriers with access to unbundled network elements (“UNEs”) on just, reasonable, and nondiscriminatory rates and conditions.¹⁴ In determining which parts of the incumbent LEC network qualify as UNEs, Section 251(d)(2) provides that “the Commission shall consider, *at a minimum*, whether . . . the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”¹⁵

The Commission first adopted rules implementing the unbundling requirements of Section 251 in the 1996 *Local Competition Order*.¹⁶ The Supreme Court, however, vacated portions of that *Order*, including the Commission’s interpretation of the “impair” standard under Section 251(d)(2).¹⁷ In response to the Supreme Court’s decision, the FCC adopted narrower requirements for determining the UNEs that incumbent LECs must provide pursuant to the “impair” standard in the 1999 *UNE Remand Order*.¹⁸ Three years later, the U.S. Court of

¹³ Pub. L. No. 104-104, 110 Stat. 56, amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (collectively, the “Act”).

¹⁴ *See* 47 U.S.C. § 251(c)(3).

¹⁵ 47 U.S.C. § 251(d)(2) (emphasis added).

¹⁶ *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶¶ 226-541 (1996) (“*Local Competition Order*”) (subsequent history omitted).

¹⁷ *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 388-90 (1999) (subsequent history omitted).

¹⁸ *See generally In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) (“*UNE Remand Order*”) (subsequent history omitted).

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Appeals for the District of Columbia Circuit vacated and remanded for further consideration, among other things, the portions of the *UNE Remand Order* in which the Commission adopted a revised interpretation of the “impair” standard and established a list of mandatory UNEs.¹⁹ The D.C. Circuit held, among other things, that the FCC’s interpretation of “impairment” failed to take into account the costs of unbundling, including the fact that mandatory unbundling at cost-based rates “reduces the incentives for innovation and investment in facilities” by both incumbent local exchange carriers (“LECs”) and competitive LECs.²⁰ Accordingly, in 2003, the FCC adopted a new unbundling framework in the so-called *Triennial Review Order* (“TRO”).²¹

In the *TRO*, the Commission held that a requesting carrier is “impaired” under Section 251(d)(2) when lack of access to a network element is likely to make market entry “uneconomic” for a reasonably efficient competitor.²² The Commission did not, however, rely exclusively on impairment analysis to make its unbundling determinations.²³ Rather, it relied on the “at a minimum” language in Section 251(d)(2) to consider the FCC’s other obligations under the statute. The FCC held that, “foremost among these” is the obligation to promote the deployment of advanced services under Section 706.²⁴ Specifically, Section 706(a) provides that

¹⁹ See generally *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”) (subsequent history omitted).

²⁰ *USTA*, 290 F.3d at 424; see also *id.* at 424-26.

²¹ See generally *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) (“*Triennial Review Order*” or “*TRO*”) (subsequent history omitted).

²² *TRO* ¶ 84.

²³ See *id.* ¶ 234.

²⁴ *Id.* ¶ 236.

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The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 157 note. The Commission decided that the best way to promote these objectives was to adopt different unbundling requirements for legacy loop plant as opposed to new loop plant used to provide broadband services.²⁵ On the one hand, the Commission held that incumbent LECs must continue to unbundle legacy copper loops and legacy TDM-based DS1 and DS3 loops because competitive LECs are impaired without access to such facilities²⁶ and mandatory unbundling of those facilities would not have a significant detrimental impact on incentives to deploy next-generation broadband facilities.²⁷ On the other hand, the FCC eliminated unbundling requirements for loops used to provide broadband services to the mass market (i.e., hybrid fiber-copper loops and FTTH loops), even “where some level of impairment may exist,”²⁸ in order to “provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities.”²⁹

²⁵ *See id.* ¶ 244.

²⁶ *See id.* ¶ 249 (copper loops), ¶ 320 (DS1 loops), & ¶ 325 (DS3 loops).

²⁷ *See id.* ¶ 244 (“Because the incumbent LEC has already made the most significant infrastructure investment, *i.e.*, deployed the loop to the customer’s premises, we seek, through our unbundling rules, to encourage both intramodal and intermodal carriers (in addition to incumbent LECs) to enter the broadband mass market and make infrastructure investments in equipment.”).

²⁸ *Id.* ¶ 173.

²⁹ *Id.* ¶ 213.

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With respect to hybrid fiber-copper loops in particular, the FCC found that, even though competitive LECs are impaired without access to a transmission path between the central office and the customer's premises,³⁰ applying Section 251(c) unbundling obligations to the packetized portion of hybrid loops "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in [S]ection 706."³¹ The Commission further held that, while it was eliminating unbundling for the packetized fiber capabilities of hybrid loops, competitive LECs would still have alternative loop options for providing broadband services because the Commission was retaining unbundling for copper subloops and TDM-based DS1 and DS3 loops.³² Moreover, the Commission held that cable entry into the mass market broadband market diminished the harmful consequences of eliminating unbundling where competitors are impaired.³³

With respect to FTTH loops, the FCC found that, while "FTTH loops display several economic and operational entry barriers in common with copper loops,"³⁴ competitive LECs were not impaired without access to such facilities for the provision of broadband services because (1) competitive LECs and incumbent LECs face "largely the same" entry barriers in

³⁰ *See id.* ¶ 286.

³¹ *Id.* ¶ 288 (emphasis added).

³² *See id.* ¶¶ 290-91 & 294.

³³ *See id.* ¶ 292 ("A primary benefit of unbundling hybrid loops – that is, to spur competitive deployment of broadband services to the mass market – appears to be obviated to some degree by the existence of a broadband service competitor with a leading position in the marketplace.").

³⁴ *Id.* ¶ 274.

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deploying new FTTH loops;³⁵ and (2) FTTH deployment enables competitive LECs to offer a triple play of voice, video, and data services, and thereby provides “substantial revenue opportunities” that can “help ameliorate many of the entry barriers.”³⁶ Moreover, the FCC predicted that, “particularly in light of a competitive landscape in which competitive LECs are leading the deployment of FTTH, removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market.”³⁷ The FCC subsequently relied on similar reasoning to eliminate unbundling obligations for FTTC loops.³⁸

³⁵ *Id.* ¶ 275.

³⁶ *Id.* ¶ 274.

³⁷ *Id.* ¶ 278.

³⁸ See generally *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Order on Reconsideration, 19 FCC Rcd. 20293 (2004) (“*FTTC Order*”). In 2004, the FCC also relieved some incumbent LECs, specifically, Regional Bell Operating Companies (“RBOCs”) of the independent obligation to provide unbundled access to the packetized portion of hybrid loops, FTTH loops, and FTTC loops under Section 271 of the Act. Section 271 requires RBOCs to provide unbundled access to specific network elements, including local loop transmission from the central office to the customer’s premises. See 47 U.S.C. § 271(c)(2)(B)(iv). In the *Section 271 Broadband Forbearance Order*, the Commission found, among other things, that eliminating the Section 271 unbundling obligations for these network elements would remove disincentives for RBOCs to invest in an “emerging” broadband market in which the RBOCs face “substantial intermodal competition” from cable providers. *In re 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, 19 FCC Rcd. 21496, ¶¶ 21-22, 33 (2004) (“*Section 271 Broadband Forbearance Order*”).

III. THE FCC HAS A DUTY TO REEXAMINE ITS POLICY WITH RESPECT TO UNBUNDLING OF HYBRID AND FIBER LOOPS IN LIGHT OF CHANGED CIRCUMSTANCES.

The FCC has the duty to revisit its decision to eliminate unbundling of hybrid and fiber loops in the *TRO* and subsequent orders in light of changed circumstances. As discussed below, the available evidence shows that the major premise underlying the Commission's decision—that elimination of unbundling was necessary to remove disincentives to invest in next-generation broadband facilities—appears to have been false. Moreover, competitors now require access to increased bandwidth in order to provide innovative applications that will yield substantial public interest benefits, but they are constrained by the Commission's existing unbundling rules. Under D.C. Circuit precedent, the Commission is therefore obligated to reexamine its unbundling policy and determine whether the existing policy is still warranted.

Indeed, the court has held that:

[C]hanges in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach “if a significant factual predicate of a prior decision . . . has been removed.” . . . The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise . . . implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would.

Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) (internal citations omitted).³⁹ While the policy at issue in *Bechtel* was embodied in a policy statement rather than codified in the

³⁹ See also *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979) (holding that an agency “cannot sidestep a re-examination of particular regulations when abnormal circumstances make that course imperative”); *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (“The rule that emerges from *Geller*, then, is a limited one: that an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed.”).

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Commission's Rules, the court's rationale nevertheless applies to a policy established through a rulemaking.

Thus, the Commission must reevaluate its decision to eliminate unbundling of hybrid and fiber loops. In all events, it is well established that the Commission has the discretion to change its existing policies so long as it provides a reasoned explanation for the change.⁴⁰

IV. THE FCC SHOULD INITIATE A RULEMAKING PROCEEDING FOR THE PURPOSE OF REQUIRING INCUMBENT LECs TO PROVIDE UNBUNDLED ACCESS TO THE PACKETIZED BANDWIDTH OF HYBRID LOOPS, FTTH LOOPS, AND FTTC LOOPS AT RETAIL RATES.

The Commission's experiment in relying on deregulation in a highly concentrated (indeed, in some locations monopolistic) broadband market as a means of promoting deployment and adoption has been a failure for the small business market. Competitive carriers, other than in some cases, cable operators, are unable to deploy loops to small businesses. The elimination of unbundling for fiber and hybrid loops has left competitors with no choice but to rely on outmoded T-1 facilities to serve small businesses. While the incumbent LECs have in many cases deployed substantial capacity in the networks that pass small businesses, there is no basis for concluding that this deployment was the result of deregulation. In fact, the available data does not show any correlation between deregulation and incumbent LEC investment in loop

⁴⁰ See, e.g., *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) ("If the FCC changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed.") (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)); *AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (holding that the FCC must provide "a satisfactory explanation" when departing from previous policies).

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plant. Moreover, neither incumbent LECs nor cable operators have used the capacity in their loop plants to cater to small businesses.⁴¹

As a result, the policies adopted in the *TRO* have left small businesses to traipse a proverbial dirt path while a modern, three-lane highway is unused. Only competitors like Cbeyond will develop and aggressively market the next-generation applications that are the key to small businesses utilization of high-capacity fiber and hybrid loops. But they can only do so if they have unbundled access to the capacity.⁴² If they were granted such access, the benefits to businesses and the economy more broadly would be enormous. Small businesses are the job creation engine of the U.S. economy, and the introduction of “game changing” business applications would establish the preconditions for investment and innovation that is not occurring today. Moreover, the costs associated with unbundling would be minimal because incumbent LECs could charge *retail* rates for the capacity at issue⁴³ and the unbundling could be designed to avoid any material reengineering of the incumbent LEC network.

⁴¹ See Declaration Of Brooks Robinson On Behalf Of Cbeyond, Inc. ¶ 4 (dated Nov. 16, 2009) (attached hereto as “Attachment A”) (“Robinson Decl.”) (“In my experience, neither incumbent LECs nor cable operators offer . . . these types of sophisticated, high-bandwidth applications at prices suitable for small businesses via fiber or hybrid loops today.”).

⁴² See *id.* (“If Cbeyond were able to obtain access to increased bandwidth via incumbent LEC fiber and hybrid loop facilities, Cbeyond (and other competitive applications and service providers) would be able to sell far more sophisticated applications to small businesses.”).

⁴³ The simplest way for the FCC to apply a retail price to an unbundled network element made available under Section 251(c)(3) is to forbear from application of Section 252(d)(1) and Sections 51.503-51.513 of the Commission’s Rules to the extent that those provisions require that prices applicable to UNEs be set based on total element long run incremental cost.

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A. The Bases For The Commission's Elimination Of Unbundling Of Fiber And Hybrid Loops Have Proven To Be False.

The available evidence indicates that the primary bases for the Commission's decision to eliminate unbundling requirements for fiber and hybrid loops in the *TRO* and subsequent orders have proven to be wrong. *First*, contrary to the Commission's prediction, there is no evidence that eliminating unbundling caused a material increase in investment by incumbent LECs or competitive LECs in next-generation broadband networks.

It is clear that competitors seeking to provide broadband at capacities between those delivered by T-1 loops (1.5 Mbps) and DS3 loops (45 Mbps) are impaired without access to the loop capacity resident in fiber and hybrid loops. That is, a reasonably efficient competitor cannot recover the costs associated with fiber loop deployment where the service to be provided yields revenues associated with even a single DS3 loop facility, let alone a DS1 loop facility.⁴⁴ It is for this reason that eliminating incumbent LEC unbundling obligations for fiber and hybrid loops has not resulted in an increase in loop deployment by competitors to small and medium businesses. Moreover, to the extent that cable operators have deployed loops to such locations, they have done so in only limited circumstances and, in any event, cable companies have benefited from unique historic advantages that cannot be replicated by reasonably efficient competitive LECs.

⁴⁴ See, e.g., Declaration of Stephanie Pendolino On Behalf Of Time Warner Telecom Inc., Attachment A to Opposition of Time Warner Telecom Inc., Cbeyond, Inc., and Eschelon Telecom, Inc., WC Dkt. No. 07-97, ¶ 5 (Erratum filed Sept. 13, 2007) (explaining that "TWTC is generally able to [economically] deploy loop facilities only to those buildings for which customers individually or collectively demand multiple DS3s of service"). Indeed, in the *Triennial Review Remand Order*, the Commission found that it is "rarely if ever economic" for a reasonably efficient competitor to construct even DS1 loops in the vast majority of wire centers in the country. See *In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 166 (2004).

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Nor is there any evidence that deregulation *per se* has caused material increases in incumbent LEC investment. A recent study by Economics and Technology, Inc. (“ETI”), which examined the overall effect on network investment of the FCC’s deregulatory policies in the early part of this decade, reveals that incumbent LEC network investment “decreased sharply” after 2001, when the FCC began pursuing its deregulatory agenda.⁴⁵ By 2007, incumbent LEC capital investments had decreased to approximately 60 percent of their 2001 level and competitive LEC capital investments decreased to less than 10 percent of their 2001 level.⁴⁶ ETI determined that Verizon spent approximately \$56.5 billion on network investments between 1996 and 2001 whereas it spent only \$39.8 billion (or 30 percent less) on network investments, including on FiOS deployment, between 2002 and 2007.⁴⁷ Likewise, according to ETI, AT&T spent approximately one-third less on capital expenditures between 2002 and 2007 than it did between 1996 and 2001, even including investments in U-Verse deployment.⁴⁸

ETI also found that between 2004 and 2007, after the FCC issued the *TRO*, “ILEC capex remained steady and increased only slightly through 2007” and “CLEC capital spending continued to decline.”⁴⁹ That is, *from an already reduced level*, incumbent LEC investment held fairly constant and rose slightly and competitive LEC investment continued to drop, contrary to

⁴⁵ See generally Lee L. Selwyn *et al.*, Economics and Technology, Inc., *The Role of Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition* at 28 (Mar. 2009) (“ETI Study”) (attached hereto as “Attachment B”).

⁴⁶ See *id.*

⁴⁷ See *id.* at 24.

⁴⁸ See *id.* at 25.

⁴⁹ *Id.* at 28.

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the expectations of the FCC when it issued the *TRO* and related decisions. Indeed, based on its analysis, ETI concluded:

[T]here has been no dramatic jump in RBOC investment since deregulatory concessions have been implemented. Indeed, the level of investment that the RBOCs committed to and spend in this latter period is neither extraordinary nor particularly risky. The Bell broadband investments of recent years represent modest steps in their networks' ongoing evolution. As to the remaining publicly traded U.S. CLECs, investments since the onset of the FCC's deregulatory period are also far lower than they had been during the first six years following passage of the 1996 Act, when wholesale rates and access were regulated. The evidence confirms why "commitments" to change investment behavior in exchange for deregulation must be viewed with skepticism. Like any business, ILECs and CLECs will invest in new technologies (in this case rolling out broadband) only where there is a business case to support such an investment[.]

ETI Study at 21-22.

Furthermore, Cbeyond's own experience shows that, to the extent that incumbent LECs have deployed high-capacity loop facilities to small businesses, those service providers in many cases do not offer and, in virtually all cases, do not proactively market to small businesses the applications that take advantage of the capacity that fiber and hybrid loops can deliver.⁵⁰ Without these applications, small and medium businesses have no use for increased broadband and they do not use it. They are generally confined to a world in which they rely on T-1 facilities which, amazingly, deliver significantly less downstream capacity than most residential broadband products deliver.

Cbeyond unfortunately does not have access to the data needed to determine the number of small or medium sized businesses that purchase broadband at capacities above the T-1 level. Nevertheless, it is noteworthy that Cbeyond has been able to achieve substantial market share, up to approximately 15 percent of businesses with between 5 and 250 employees in mature

⁵⁰ See Robinson Decl. ¶ 4.

markets, by offering service exclusively via T-1 loops. Moreover, as mentioned, it is Cbeyond's experience that incumbent LECs have not developed a sophisticated portfolio of business applications at prices suitable for small businesses that take advantage of capacities above the T-1 level.⁵¹

Second, cable operators' presence in the market does not compensate for the incumbent LECs' neglect of small businesses. Cable operators have focused on the very smallest businesses, such as the small office/home office, or SOHO sector. They have not, as a general matter, focused their marketing efforts or their application portfolio on the critical business sector of companies with between 5 and 250 employees. This is because these small businesses require an individualized, consultative approach to sales and marketing. Cbeyond employs an army of salespeople in every market it enters to knock on the doors of small businesses and to engage in one-on-one conversations about the benefits of new business applications to business productivity.⁵² Cable companies' mass market approach to designing and marketing products relies on mass advertising and relatively unsophisticated applications. It is entirely inappropriate for small businesses. As a result, small businesses do not generally view cable companies' business service as a substitute for the services offered by Cbeyond.⁵³ Cbeyond's low rate of churn proves this point.⁵⁴

⁵¹ *See id.*

⁵² *See id.* ¶ 3 (“During these consultative sales visits, Cbeyond representatives explain the benefits associated with its small business applications and services. . . . This consultative sales model . . . resonates well with entrepreneurs.”).

⁵³ *See id.*

⁵⁴ *See id.* (“Cbeyond has found that its rate of churn to incumbent LECs and cable operators has been low across markets because Cbeyond's small business customers experience efficiency and productivity gains from Cbeyond applications and services and because small businesses do not

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Third, the availability of unbundled T-1 and DS3 loops does not compensate for the elimination of unbundled fiber and hybrid loops. Cbeyond is ready today to develop a series of applications for small businesses that are utilized almost exclusively by large businesses.⁵⁵ These applications include virtualized desktops, remote desktop management, high-resolution video conferencing, broadcast/live video streaming, robust data protection, sophisticated video security systems, cloud computing and software as a service.⁵⁶ These are proven applications that yield unquestioned efficiencies. Small businesses could rely on them to lower their costs and increase productivity. But Cbeyond cannot offer these applications via T-1 loops because the applications require much more bandwidth than 1.5 Mbps. Moreover, DS3 loops are too expensive to serve as a viable substitute. Cbeyonds needs the increased capacity that fiber and hybrid loops can provide in order to deliver the applications at issue.

Fourth, the availability of unbundled copper loops does not make up for the harms caused by eliminating unbundling of fiber and hybrid loops. Competitors can rely on unbundled conditioned copper loops and EFMC technology to provide high-bandwidth (e.g., 10 Mbps, sometimes more) services and applications to small business customers, but they can do so in only a minority of customer locations. In order to provide EFMC service to a customer, copper must be available from the central office directly to the customer premises.⁵⁷ In many suburban

perceive the offerings of incumbent LECs and cable operators as viable substitutes for the applications and services that Cbeyond offers.”).

⁵⁵ *See id.* ¶ 4.

⁵⁶ *See id.*

⁵⁷ EFMC cannot be provided over a loop containing fiber feeder unless EFMC equipment has been installed at a remote terminal, something which, based on Cbeyond’s experience, no potential wholesale provider has done to date.

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areas, however, copper has not been maintained or it has been removed from locations served by fiber. Moreover, in order to provide EFMC, copper loops cannot exceed a certain length. In particular, Cbeyond would not provide EFMC to customers served by loops that are longer than 15,000 feet.

Cbeyond recently conducted a study to determine the percentage of its existing customer base in the AT&T territory that could be served via EFMC technology. Specifically, based on data provided by a Cbeyond vendor which Cbeyond has independently verified, Cbeyond was able to determine the number and percentage of Cbeyond customer addresses in AT&T territory that are served by home run copper. Cbeyond was further able to identify the number and percentage of existing customer addresses that are served by copper loops that are 15,000 feet or less in length and that can therefore be served via EFMC. As shown in the table attached hereto as "Attachment C," Cbeyond found that it can serve only 37 percent of its existing small business customer base in AT&T territory using EFMC.⁵⁸

Accordingly, although EFMC is a valuable innovation that can be used to serve small business customers, it represents only a partial solution to providing increased broadband to small and medium business customers. Indeed, notwithstanding that Cbeyond's analysis was limited to AT&T's territory, given the breadth of Cbeyond's network coverage in the large

⁵⁸ In Attachment C, the figures in column 6 entitled "Number of Cbeyond Addresses Served Where Copper Is Unavailable" represent the number of Cbeyond customer addresses in each market served by hybrid loops that cannot support EFMC services. These numbers are accurate for the AT&T Southeast region because the loop qualification data for that region contains a field that explicitly states that copper loops are unavailable to the submitted address. In the remaining AT&T regions, the loop qualification data is not as precise and therefore, a certain percentage of the loops in this column were likely "unavailable" due to reasons other than lack of copper. Nevertheless, this data can be roughly validated by comparing it to that for the AT&T Southeast region. Furthermore, Cbeyond's experience in provisioning EFMC in metropolitan areas outside of the AT&T Southeast region indicates that the results of the instant analysis are accurate to within several percentage points in either direction.

metropolitan areas in which it operates in that territory, Cbeyond's analysis provides a representative survey of the feasibility of using EFMC to serve small and medium businesses throughout the U.S. The bar graph depicting the results of Cbeyond's analysis, attached hereto as "Attachment D," illustrates this point.

In sum, whatever the effect may have been in the residential market of the FCC's decision to eliminate fiber and hybrid loop unbundling, and the available evidence indicates it has been non-existent or limited, that policy has had a negative effect on small businesses. It has left the critical small business sector stuck in the old T-1 world, without the efficiency-enhancing applications that can be provided via higher-bandwidth loop connections. There is no question that competitors are impaired without access to unbundled fiber and hybrid loops and that the policies of Section 706 have been undermined by the elimination of such UNEs. The FCC must therefore reassess the benefits and costs associated with requiring incumbent LECs to unbundle fiber and hybrid loops serving business customers.

B. The Benefits Of Unbundling Fiber And Hybrid Loops Serving Small And Medium Businesses Would Outweigh The Costs.

The policy changes proposed herein would yield substantial public interest benefits for competition and the economy as a whole. They would do so without imposing significant costs on consumer welfare.

The benefits of providing competitors with access to fiber and hybrid loops would be enormous. Information technology solutions can have a critical impact on small business productivity, and unbundling of fiber and hybrid loops would free up bandwidth needed to enable competitive applications providers to deliver applications that are "game changers" for small and medium businesses. As the Cambridge Strategic Management Group concluded in its recent National Broadband Plan Policy Evaluation, "history has shown that innovative

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application development is preceded by increases in bandwidth.”⁵⁹ High-bandwidth applications, such as virtual desktops, high-resolution video conferencing, robust data protection, and sophisticated video security systems, would help lower start-up and expansion costs for small businesses and drive increased productivity.

The increased efficiency of small businesses will spur job creation and a virtuous cycle of investment and innovation, all without any government spending. As more small businesses recognize the benefits of the applications, their demand for broadband will increase, thereby spurring further investment in fiber deployment. Moreover, each application builds on the next, and investment in the development of efficiency-enhancing business tools would likely increase substantially. All of this advances the goals of broadband deployment in Section 706 and the creation of jobs.

Importantly, these benefits would come with relatively few costs to consumer welfare. Cbeyond proposes that incumbent LECs offer a high-bandwidth connection, between 6 and 10 Mbps, serving small businesses over fiber and hybrid loops at the lowest retail price offered by the incumbent LEC in the relevant MSA. The retail price certainly compensates the incumbent LEC for the cost of the facility, plus a profit.

In addition, the incumbent LEC could provide the unbundled loop in a manner that largely eliminates the need for complex engineering. For example, the optimal mode of delivery would be a bit stream transmission path from the small business end user to a central aggregation point in the incumbent LEC’s network in a LATA, at which point the competitor could pick up

⁵⁹ Letter from Thomas Cohen, Counsel for the Fiber to the Home Council, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51, Attachment: CSMG National Broadband Plan Policy Evaluation, at 14 (filed Nov. 2, 2009). While CSMG’s analysis focused on applications for mass market customers, its finding that increased bandwidth will “drive new applications and services not envisioned today” also applies to applications for the small business market.

the bit stream and carry it back to its network. Such an approach could be tailored to the needs of the incumbent LEC's network without significant work.

The combination of retail prices and minimal engineering intervention would all but eliminate the concern, so often expressed by the FCC in the past, that unbundling would diminish the incumbent LECs' incentive to deploy new, more advanced network facilities. Moreover, in light of the tremendous benefits associated with unbundling for fiber and hybrid loops, the associated costs would be insignificant.

C. The Experience Of Other Countries That Have Maintained Consistent Unbundling Requirements Supports The Conclusion That Unbundling Fiber And Hybrid Loops Serving Small And Medium Businesses Would Result In Net Public Interest Benefits.

In a recent study conducted for the FCC, Harvard University's Berkman Center for Internet & Society concluded that the experiences of other countries show that (1) unbundling requirements have not diminished the incentive of incumbent LECs to deploy fiber facilities to customers, especially where prices for unbundled loops are carefully set to enable the incumbent to earn a healthy profit; and (2) aggressive and conscientious regulatory oversight of incumbent LEC market power, including unbundling requirements, have contributed to strong broadband performance across a range of metrics, including penetration, capacity, and affordability.⁶⁰ To be sure, each of the high-performing countries analyzed in the Berkman Study has pursued regulatory oversight of the incumbent using different techniques, and factors other than mandated unbundling (e.g., the presence of a robust cable competitor to the incumbent LEC), have an important effect on broadband deployment, prices and adoption. Nevertheless, the study

⁶⁰ See generally Berkman Center for Internet & Society at Harvard University, *Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world* (Oct. 2009 Draft), http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf ("Berkman Study").

makes clear that consistent enforcement of unbundling requirements has yielded major benefits in many countries.⁶¹

For example, in Japan, the imposition of unbundling requirements, updated to include fiber loops to reflect the changing needs of competitors, has played an important role in reducing broadband prices and in establishing the preconditions for competitors' entry and future investment in their own facilities. The intramodal competition made possible by unbundling as well as intermodal, facilities-based competition have yielded higher levels of broadband deployment than has been the case in the U.S.⁶²

Japan has experienced high broadband performance in part because regulators there recognized that, in order to innovate, competitors may require access to different inputs at different times.⁶³ As the study concludes,

The system of observation [by Japanese regulators] is not based on clear ex ante definitions of regulated versus unregulated elements (say copper, or even fiber), but on continuously updated and reviewed actual dependencies between elements of the integrated services, followed by continuous updating of whether, and what, elements require access by dependent services to assure continuing competition.

⁶¹ In addition to its qualitative analysis discussed above, the Berkman Center's independent evaluation of econometric studies that have examined whether local loop unbundling has had an effect on broadband penetration rates shows that "unbundling rules, effectively enforced, increase [broadband] penetration" in other OECD countries. *See id.* at 117 (concluding that "much of the ambiguity in prior analyses" was largely due to the experience of one country, Switzerland, which achieved success in terms of broadband penetration and pricing before the introduction of unbundling in 2007). In particular, the Berkman Study found that "unbundling . . . appears to have a statistically significant, robust, effect[] of about 1% per year of effective enforcement" on broadband penetration growth. *Id.*

⁶² *See, e.g., id.* at 83 (stating that Japan is among the highest performers across a range of broadband metrics).

⁶³ *See id.* at 86.

Berkman Study at 86. Importantly, according to the study, the incumbent in Japan, NTT, was not deterred from investing in its own network in part because network elements were priced above cost. In Japan, “[t]he price for elements, in particular for fiber, is to be set so as to secure a profit for the incumbent that invested in the fiber.”⁶⁴ The study reached the following conclusions, among others, regarding Japan’s experience:

- A regulator capable of continuous monitoring and updated response can permit greater latitude for business innovation, secure, for itself and competitors, that it will identify and be able to act upon anticompetitive abuses masked as innovation.
- Access to incumbent networks, at regulated rates, was a critical part of the most visible early introduction of broadband into Japan with Yahoo!BB and is considered in Japan to have played a major role in driving speed and price competition.
- Access requirements do not seem to have stymied investments in fiber by NTT.

Id. at 87.

In the Nordic countries (i.e., Denmark, Norway and Sweden) that have performed better than the U.S. in the deployment of broadband, the Berkman Study found that “a well functioning unbundling and open access regulatory regime, combined with well functioning markets and facilities-based competition, create a competitive market and deliver high levels of penetration and quality at, mostly, reasonable prices.”⁶⁵ Moreover, the study found that the “risks” associated with unbundling and open access, namely “that incumbents would disinvest, that entrants would never graduate to independent competitors—did not materialize.”⁶⁶

⁶⁴ *Id.*

⁶⁵ *Id.* at 90.

⁶⁶ *Id.*

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In addition, in the Netherlands, another country with higher levels of broadband deployment than the U.S.,⁶⁷ unbundling requirements have also been a key part of broadband policy.⁶⁸ The Netherlands retained unbundling requirements as competition developed and extended those requirements to the incumbent LEC's fiber loop facilities.⁶⁹ The incumbent LEC has complied with the fiber unbundling requirements by essentially agreeing to a voluntary quasi-structural separation of its loop and non-loop operations.⁷⁰ Importantly, these unbundling requirements were imposed notwithstanding the presence of a robust cable competitor with high levels of penetration.⁷¹ The policy has been successful. As the study explains, the Netherlands is a "clear example in which unbundling complements facilities-based investment and competition."⁷²

In contrast, in countries that have failed to implement loop unbundling effectively and have instead required that competitors deploy the entire network themselves in order to serve customers, broadband deployment has been less successful than likely would have been the case if unbundling had been required. For example, the Berkman Study explains that in Germany, "as in the United States," the incumbent LEC "used judicial review to challenge and delay or prevent

⁶⁷ Compare *id.* at 206 (relying on penetration, speed and price metrics to demonstrate that the "Netherlands has been a global leader in broadband deployment") with *id.* at 10 (relying on similar metrics to demonstrate that the "U.S. is a middle-of-the-pack performer on most first generation broadband measures").

⁶⁸ See *id.* at 94.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.* at 94-95.

⁷² *Id.*

most major regulations related to access by, or prices charged to, competitors.”⁷³ As a result, unbundling has been ineffective and of limited application in Germany.⁷⁴ The Berkman Study explains that a “review of [Deutsche Telekom’s] primary competitors suggests that the need to build a facilities-based alternative from the ground up has limited entry to large, locally-anchored networks, and hampered their expansion beyond their original core regions.”⁷⁵ There are several reasons for Germany’s relatively poor performance in deployment of affordable broadband (among them the absence of a robust cable competitor to Deutsche Telekom), but the failure to enforce unbundling requirements seems to have contributed materially to such performance.⁷⁶

Similarly, Canada has failed to effectively enforce unbundling requirements and has performed poorly in terms of broadband penetration, capacity, and affordability. Indeed, based on a quantitative analysis of the prices charged for the highest speeds of broadband offered by the 59 firms in the countries studied, the study found that “the lowest prices and highest speeds are offered by firms that occupy a market with unbundling-based entrants alongside incumbent telecommunications companies and facilities-based competitors, both cable and power” whereas “the highest prices and lowest speed combinations occur in North America, where there are no unbundling-based entrants, and where both the United States, formally, and Canada, practically, have come to rely on inter-modal competition.”⁷⁷

⁷³ *Id.* at 99.

⁷⁴ *See id.*

⁷⁵ *Id.* at 100.

⁷⁶ *See id.* at 99-101.

⁷⁷ *Id.* at 136.

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The Berkman Study therefore offers significant support for the conclusion that effective enforcement of unbundling requirements can yield substantial net benefits for broadband deployment and prices. The study also calls into serious question the FCC's reasoning in the *TRO* and subsequent decisions that unbundling would cause incumbent LECs to forego investing in fiber loop facilities and that the existence of intermodal competition from cable companies obviates the need to require unbundling of such facilities.

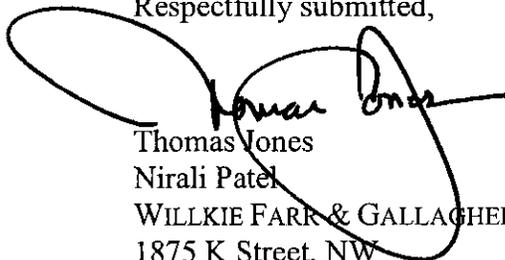
V. CONCLUSION

For all of the reasons discussed herein, the Commission must now reassess its experiment with deregulation as it pertains to small businesses. The available evidence indicates that eliminating fiber and hybrid unbundled loops has affirmatively harmed small businesses because it has denied the firms that specialize in serving small businesses the bandwidth they need to innovate and drive adoption. The consequences of this denial are extremely serious in an environment in which unemployment has reached historic highs and small businesses have not generated new jobs as they have in the past.

It is therefore critical that the Commission promptly initiate an expedited rulemaking for the purpose of determining the extent to which it should reverse the deregulatory decisions in the *TRO* and its progeny. Every day the FCC delays such action is another day in which the critical small business sector remains mired in a world of slow T-1 access and primitive business tools. The time to address this problem is now.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Jones", is written over a large, hand-drawn oval scribble.

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ATTACHMENT A

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Cbeyond, Inc. Petition for Expedited)
Rulemaking to Require Unbundling of) WC Docket No. 09-__
Hybrid, FTTH, and FTTC Loops)
Pursuant to 47 U.S.C. § 251(c)(3) of the Act)

**DECLARATION OF BROOKS ROBINSON
ON BEHALF OF CBeyond INC.**

1. My name is Brooks Robinson, and I am the Chief Marketing Officer of Cbeyond, Inc. (“Cbeyond”). In this role, I lead Cbeyond’s sales and marketing organization. I have also held leadership positions in business strategy, operations and channel development at Cbeyond since early 2000. Prior to joining Cbeyond, I worked for Cambridge Strategic Management Group (“CSMG”), a strategy consulting firm in Boston. While at CSMG, I managed consulting engagements that focused on strategy development and business case due diligence for the telecom and high-tech sectors. Previously, I managed consulting engagements for Deloitte Consulting in Toronto and held various engineering positions at Nortel in Ottawa. I hold a bachelor of applied science degree in electrical engineering and management science from the University of Waterloo (Canada) and the University of Queensland (Australia).

2. Cbeyond provides IP-based applications and managed services via T-1 loops to more than 46,000 small businesses, which typically have between 5 and 249 employees, in 12 markets throughout the United States. Cbeyond currently offers applications via T-1 loops to small businesses that neither incumbent local exchange carriers nor cable operators offer to small businesses. These include Virtual Private Networking, Hosted Microsoft Exchange, Secure Backup & Fileshare, and SIP trunking service.

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3. Cbeyond has been successful in selling these applications to small businesses because, unlike either incumbent LECs or cable operators, Cbeyond utilizes a field-based and consultative sales model. Cbeyond relies on approximately 55 direct sales representatives per market to make on-site visits to potential customers. During these consultative sales visits, Cbeyond representatives explain the benefits associated with its small business applications and services. The IT and telecom applications provided by Cbeyond increase the productivity of its small business customers and help them survive in these challenging economic times. This consultative sales model and value proposition resonates well with entrepreneurs. Cbeyond has found that its rate of churn to incumbent LECs and cable operators has been low across markets because Cbeyond's small business customers experience efficiency and productivity gains from Cbeyond applications and services and because small businesses do not perceive the offerings of incumbent LECs and cable operators as viable substitutes for the applications and services that Cbeyond offers.

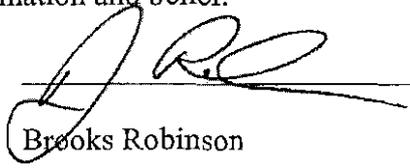
4. If Cbeyond were able to obtain access to increased bandwidth via incumbent LEC fiber and hybrid loop facilities, Cbeyond (and other competitive applications and service providers) would be able to sell far more sophisticated applications to small businesses. These include virtualized desktops, remote desktop management, hosted digital image and file management, high-resolution video conferencing, broadcast/live video streaming, robust data protection, sophisticated video security systems, cloud computing, and software as a service. Cbeyond is ready today to develop these innovative, "big business" applications, which will provide numerous benefits to Cbeyond's small business customers. For example, a virtualized desktop, in which a user's computing environment is hosted in the cloud, lowers equipment costs for small business owners, allows for immediate upgrades to the latest versions of software

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at no additional cost, enables collaboration among employees, and allows employees access to their documents from anywhere in the world. Hosted digital image management is especially important for doctors who need vast amounts of capacity for the secure, long-term storage of medical images such as x-rays and CAT scans. And software as a service applications lower small business start-up costs, eliminate the need for on-site hardware, and provide complete scalability as a new business grows. In my experience, neither incumbent LECs nor cable operators offer—let alone use a consultative sales approach to sell—these types of sophisticated, high-bandwidth applications at prices suitable for small businesses via fiber or hybrid loops today.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



Brooks Robinson

Dated: Nov. 16, 2009

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ATTACHMENT B

**THE ROLE OF REGULATION IN A
COMPETITIVE TELECOM ENVIRONMENT:**

**How Smart Regulation of Essential Wholesale
Facilities Stimulates Investment and Promotes
Competition**

Lee L. Selwyn
Susan M. Gately
Helen E. Golding
Colin B. Weir

March 2009



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