Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

CBEYOND, INC. PETITON FOR EXPEDITED RULEMAKING	))	**WC Docket No. 09-223**

COMMENTS OF THE

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits these comments in response to the Petition for Expedited Rulemaking of Cbeyond, Inc..[1] ITTA is an alliance of mid-size telephone companies that collectively serve approximately 24 million access lines in 44 states, and offer subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services.

Cbeyond asks the Commission to initiate a rulemaking proceeding for the purpose of requiring incumbent LECs to provide unbundled access to the packetized bandwidth of hybrid loops, fiber to the home (FTTH) loops, and fiber to the curb (FTTC) loops at retail rates. Cbeyond claims that the Commission's reasoning was wrong when it found fiber and hybrid loops should not be subject to mandatory unbundling. Cbeyond offers its opinion that the benefits of unbundling would outweigh the costs. ITTA opposes the petition. The Commission's findings were amply justified, and the Commission's policy has proven successful in fostering unprecedented investment, growth, innovation, and consumer benefits. The petition should be denied.

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[1] *Petition of Cbeyond for Expedited Rulemaking and Request for Highly Confidential Treatment,* WC Docket No. 09-223 (Nov. 16, 2009) (Petition).

II. DISCUSSION

In its petition, Cbeyond asks the Commission to compel incumbent local exchange carriers (ILECs) to provide unbundled access, pursuant to Section 251(c)(3) of the Communications Act of 1934, as amended, to the packetized bandwidth of hybrid fiber-copper loops, FTTH loops, and FTTC loops at retail rates.[2] Cbeyond claims that the basis of the Commission's decision to eliminate unbundling of these elements, specifically, that doing so would eliminate disincentives for network investment, has been proven wrong.[3] ITTA disagrees. Broadband investment by mid-size carriers has been strong and has resulted in robust networks serving broad reaches of rural America. The Commission's elimination of unbundling requirements was proper, and should be maintained.

Cbeyond invokes the current troubled economic climate in its quest to restore investment destroying fiber unbundling requirements on ILECs. Cbeyond cites current high unemployment levels and the need to stimulate job creation as a rationale for its petition.[4] For example, Cbeyond explains, "[T]he only long-term solution to underemployment is to establish the precondition for private enterprise to create jobs by investing in the development of new and innovative goods and services."[5] Cbeyond's petition would not create jobs. Moreover, Cbeyond's theories, however momentarily appealing, are insufficient to justify the extraordinary policy change that Cbeyond seeks.

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[2] Petition at 1.

[3] Petition at 5.

[4] Petition at 2.

[5] Petition at 2.

The Commission's decision to forbear from requiring unbundling of fiber loops was based on the realization that mandatory unbundling would discourage investment in fiber loops. Promoting investment was and remains essential to U.S. Internet policy, and Congress has repeatedly emphasized the need to promote investment, especially in Internet infrastructure. Cbeyond claims that ending this policy would promote employment, but in fact it would handicap fiber network investment and damage employment prospects in the telecom industry. While admittedly it might give some competitors, like Cbeyond, an edge in the marketplace, that would occur only by shifting network and transport costs onto ILECs to give CLECs an artificial price advantage.

The notion that this policy change would promote employment at small businesses is equally faulty. The petition alleges wrongly that ILECs have deprived small businesses from applications such as virtualized desktops, hosted file management, broadcast and live video streaming, and other tools often also used by large businesses. A declaration submitted with the petition claims that "small businesses do not perceive the offerings of incumbent LECs and cable operators as viable substitutes for the applications and services that Cbeyond offers."[6] That assessment arises out of Cbeyond's staff of direct sales representatives,[7] and is not based in reality. It is clear from Cbeyond's declaration, however, that *price* is the only factor that allegedly distinguishes Cbeyond's offering from those of the ILECs: the declarant states, "neither incumbent LECs nor cable operators offer . . . these types of sophisticated, high-bandwidth

[6] Declaration of Brooks Robinson at 2 (Robinson Declaration).

[7] *Id.*

applications at *prices* suitable for small businesses via fiber or hybrid loops today."[8] That is a far cry from the assertion that ILECs have chosen to "not focus their resources" on serving small businesses.[9] Cbeyond wants the Commission to adopt a policy that gives Cbeyond artificially low costs, so it can provide at lower prices services that ILECs already offer to small businesses.

The petition asserts that most small business locations are not served by copper loops that are suitable for Ethernet over First Mile Copper (EFCM).[10] ILECs have been investing heavily in fiber loops wherever it can be justified, and that investment is continuing at a vigorous, healthy pace. ILECs have borne the risk of investing in fiber and hybrid fiber-copper loops, while CLECs have not. Where small businesses do not yet have access to fiber, CLECs could deploy their own, rather than urging the Commission to destroy incentives for continued ILEC investment.

When removing unbundling requirements for FTTH loops, the Commission found that entry barriers in "greenfield" construction were "largely the same" for ILECs and CLECs. The Commission noted, "Competitive LECs' active participation in deploying FTTH loops demonstrates that carriers are not impaired if we refrain from unbundling these loops."[11] And, the Commission found that the *same* non-impairment applied to

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[8] Robinson Declaration at 3 (emphasis added).

[9] Petition at 4.

[10] Petition at 4.

[11] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability: Report and Order and Order on Remand and Further*

overbuild deployments in which ILECs deploy fiber to replace or parallel to existing copper plant.

The Commission noted, "[b]oth competitive LECs and incumbent LECs must obtain materials, hire the necessary labor force, and construct the fiber transmission facilities."[12] The Commission recognized the need to continue to provide CLECs with access to a transmission path capable of supporting narrowband services, and accordingly required ILECs that overbuilt FTTH to either (a) maintain copper connections to particular customers after FTTH deployment, or (b) provide unbundled access to 64 kbps of the FTTH loop.[13] This approach is wholly consistent with the statutory directive for ILECs to provide access to network elements "for the provision of a telecommunications service."[14] In fact, a key underpinning of the Commission's decision to eliminate unbundling requirements for FTTH was that "[t]he record demonstrates that mass market FTTH loops are used almost entirely for providing broadband services (or broadband in conjunction with narrowband services) at this time, and that carriers are not deploying such loops to provide narrowband services only."[15] Cbeyond's petition fails to provide authority to justify access to other elements it claims are somehow necessary to provide,

Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at para. 275 (2003) (Unbundling Order).

[12] Unbundling Order at para. 276. The Commission continued, "revenue opportunities associated with deploying any type of FTTH loop are greater than for services provided over copper loops. . . . the potential rewards for deploying overbuild FTTH loops are distinctly greater than those associated with deploying copper loops and thus present a different balance when weighed against the barriers to entry."

[13] Unbundling Order at para. 277.

[14] 47 USC § 251(c)(3).

[15] Unbundling Order at para. 274 (internal citation omitted).

inter alia, "robust data protection, cloud-based backup, sophisticated video security systems, cloud computing, and software . . . ."[16]

Cbeyond claims that grant of its petition will "deliver big business applications to small businesses, with transformative effects."[17] It would be difficult to argue against the provision of "big" applications to "small" business, but, indeed, carriers already provide that. As noted above, Cbeyond acknowledges implicitly that carriers already provide these services to small businesses. It is Cbeyond's assertion that the *pricing* is not as favorable to small businesses as it would be if Cbeyond could offer the service using below-cost access to ILEC facilities and transport.[18] Cbeyond's assertion of price superiority (itself hardly a basis to compel unbundling), however, must be viewed within the context of the factors that would tend to underlie its pricing structure.

By attempting to obtain unbundled access to FTTH and other advanced technology loops, Cbeyond seeks the benefits of costly, labor-intensive deployments, but without any of the risk. A recent White Paper identified the risks associated with physical infrastructure as the highest when examining the various "layers" of high-speed access to applications. The paper cited "high investment costs, long cost-recovery cycles, and the potential for technological/competitive stranding of equipment."[19] The paper

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[16] Petition at 3.

[17] Petition at 4.

[18] Robinson Declaration at 3 ("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.")

[19] "Financial Market Perspectives: Network Neutrality Principle 5," Balhoff & Williams, LCC, at 1 (Dec. 2009).

continued, "policymakers should ensure appropriate incentives for network investment, including special mechanisms for high-cost regions, while avoiding unnecessary disincentives."[20] Although the White Paper focuses ultimately on network management, the axioms it sets forth regarding risk and risk avoidance are broadly applicable.

Cbeyond's attempts to obtain the benefit of ILEC investment, without any of the risk, is especially troublesome in high-cost markets such as those served by ITTA members. In lower-density markets, and for small business customers, the economics of fiber deployment are already difficult. Moreover, while Cbeyond claims that carriers are ignoring small businesses, that is simply not the case. In August 2009, *Business Wire* reported that Qwest was set to deploy for Denver-area Cherry Creek School District No. 5 a network that will enable "virtualized desktop infrastructure."[21] Cbeyond also alleges a troubled "cause and effect," namely, that the delisting of UNEs did not result in sufficient investment. The theory advanced by Cbeyond, however, does not appear to contemplate general speculative telecom investment conditions of 2000 and the surrounding years. In fact, a report prepared for the Commission demonstrates that broadband market participants have invested heavily in their networks, and intend to continue that trend into the future.[22]

[20] *Id.*

[21] "Qwest to Deliver Dedicated Fiber Network to Denver-area School District," Business Wire (Aug. 20, 2009) (http://smart-data-centers.tmcnet.com/news/2009/08/20/4333087.htm (last viewed Jan. 11, 2010, 16:32).

[22] "Broadband in America: Where It Is, and Where It Is Going (According to Broadband Service Providers), Robert C. Atkinson, Ivy E. Schultz, Columbia Institute for Tele-Information, New York City (Nov. 11, 2009) (CITI Report).

Mid-size carriers, including ITTA members, are providing and expanding broadband services in their territories. Qwest is offering data plans up to 20 mbps,[23] and continuing fiber-to-the-node (FTTN) deployments.[24] CenturyLink has deployed 10 mbps service in some areas, offers 1.5 mbps video service in rural Alabama,[25] and projects 100 percent broadband deployment by July 2012.[26] In its 2006 annual report, Cincinnati Bell projected $30 million investments in 2007.[27]

The petition cites purported investment decreases by Verizon and AT&T,[28] but it ignores where investment by those major carriers has increased, and where it has decreased. For example, Verizon has sold off many lines in its rural territories, indicating that the company's broadband investment efforts are focused toward urban areas. Other carriers that have acquired those lines are determined to invest in fiber wherever it can be justified.

The ETI report provided with the Cbeyond petition notes correctly that, "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 – i.e., increased revenue opportunities, response to competition, and/or improved operational efficiencies." This "business case," however, is undermined when a provider is forced to

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[23] CITI Report at 38, 39.

[24] CITI Report at 46.

[25] CITI Report at 37.

[26] CITI Report at 27.

[27] CITI Report at 44.

[28] Petition at 15.

unbundle the network for which it has assumed the risk and effort to deploy. Cbeyond's petition makes matters worse by seeking a price ceiling on access to fiber loops and by also forcing ILECs to provide transport (at their own expense) to serve Cbeyond's business model. That cannot stand policy scrutiny. The Commission was clear, and correct:

> [E]xcessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology. The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.[29]

The petition seems to recognize that fiber investment is inherently expensive and carries great economic risk. Cbeyond pleads that it "needs the increased capacity that fiber and hybrid loops can provide in order to develop the applications at issue."[30] Ultimately, the basis for Cbeyond's petition is not a grounded legal justification, but rather an unproven (and actually specious) allegation that ILECs "neglect" small businesses.[31] That Cbeyond has identified an opportunity to profit upon the risk undertaken by ILECs does not justify unbundling. The carrier deploying the facility, and undertaking the expense and risk associated with that, must not be subject to loss simply because a competitor supposes that it can use that facility, on a stand-alone basis and apart from the cost of risk, in a manner to exact revenues free of encumbered obligations. ILECs have undertaken the risks, and, consistent with Commission projections, have

[29] Unbundling Order at para. 3.

[30] Petition at 18.

[31] Petition at 17.

deployed high-capacity facilities. Carriers have acted upon incentives to build without the obligation to share the fruits of their labor with the competition. Proposals that carriers now, five years later, be forced to share that infrastructure raises the specter of a perhaps inadvertent, yet damaging, "bait and switch"-type process. Cbeyond's petition would destroy incentives for continuing fiber loop deployment, and deny access to high capacity services to many small businesses that otherwise would expect to see them soon.

III. CONCLUSION

The Commission concluded that lifting unbundling obligations from fiber and hybrid loops would promote investment in high capacity facilities. The policy has succeeded, and it continues to fuel rapid of fiber and hybrid loops. Cbeyond wants the Commission to give it and other CLECs access to that investment without the risk, and with artificially low pricing and free transport. Granting the petition would put the brakes on investment (and employment), and ultimately hurt the business consumers Cbeyond purports to serve. For these reasons and those expressed above, the petition should be rejected.

Respectfully submitted,

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