

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

Cbeyond, Inc. 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

WC Docket No. 09-223

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**INTRODUCTION AND SUMMARY**

In its Petition for Expedited Rulemaking,<sup>2</sup> Cbeyond seeks to have the Commission reverse six years of settled law and policy so that competitive local exchange carriers (“CLECs”) can gain unbundled access to a packetized broadband service. The Commission should deny the petition. The Commission’s existing decisions — which do not require incumbent local exchange carriers (“ILECs”) to unbundle the packetized capabilities of their fiber-to-the-premises (“FTTP”) and hybrid loops — had the intent and the effect of promoting massive investment in advanced broadband facilities and spurring ever more robust intermodal competition. Cbeyond gives no basis to disrupt this successful policy, much less makes any showing either that impairment exists with respect to the facilities at issue or that the substantial costs of the unbundling sought are outweighed by any purported benefits.

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

<sup>2</sup> Petition for Expedited Rulemaking, *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*, WC Docket No. 09-223 (filed Nov. 16, 2009) (“*Cbeyond Petition*”).

The Commission has repeatedly concluded that providers are not impaired without unbundled access to broadband elements of incumbent LECs' networks and, moreover, that mandating access to broadband elements would affirmatively harm competition; those determinations have, without exception, been upheld by the courts. As the Commission recognized in 2003, mandatory unbundling of such elements would diminish the incentives of both ILECs and CLECs to invest in advanced broadband infrastructure. ILECs are less likely to invest in expanding and upgrading their networks if they must share the fruits of that investment with their rivals; CLECs, meanwhile, have little incentive to build their own facilities if they are able to gain access to ILECs' networks with no risk.

The Commission's predictive judgment that refusing to mandate broadband unbundling would spur broadband investment has been proven correct. The number of high-speed Internet lines in the United States — including both business and residential customers — increased nearly six-fold between 2003 and 2008, from 23 million to 132.8 million. Relying on the Commission's policy, ILECs such as Verizon have invested billions of dollars in upgrading and expanding their broadband networks and deploying new fiber facilities. In 2008, BOCs alone invested a combined \$11.9 billion in their broadband networks, a 65 percent increase since 2006. And the deployment of fiber broadband infrastructure has been nothing short of explosive. In 2003, there were just 110,000 fiber lines in the United States, but by 2008 that figure had grown to 2.3 million. Between 2003 and 2007, ILECs deployed enough fiber to circle the earth almost seven times. CLECs, cable operators, and wireless providers (both fixed and mobile) also continue to invest heavily in their broadband networks and aggressively market a wide range of broadband services.

Despite this evidence of robust investment and vigorous competition, Cbeyond proposes that the Commission reverse course and mandate that ILECs — alone among providers of broadband networks — provide CLECs with unbundled access to broadband elements. Moreover, although Cbeyond characterizes its request as one for unbundled loops, it appears in fact to be seeking an especially intrusive and unprecedented sharing of the entirety of incumbents’ packetized, fiber networks, including loops, switching, and transport. There is no basis in law or public policy to grant them that access, which would — in fact — be counterproductive to Congress’s and the Commission’s long-stated goals of promoting the deployment and adoption of broadband networks and services.

Indeed, although Cbeyond invokes § 251(c)(3), it makes no effort to demonstrate that the statutory “impairment” standard — the “touchstone” of the unbundling analysis — is satisfied with respect to FTTP and hybrid loops. In fact, Cbeyond could not make such a showing. Providers of all types — including CLECs, cable companies, and fixed and mobile wireless providers — are demonstrably capable of deploying their own fiber facilities (or wireless broadband services) and using them to compete without unbundled access to ILEC fiber loops. Even aside from the fact that there is no impairment, Cbeyond makes no showing that any supposed benefits from imposing unbundling would outweigh its costs. Here, too, Cbeyond could not make such a showing. The Commission and the courts have repeatedly recognized that there are significant costs to mandating unbundling of packetized, broadband networks.

In short, and as the courts have consistently held, the Commission reached the correct conclusion in refusing to mandate unbundling of ILEC broadband network elements. Those decisions have resulted in a rapid expansion of the availability of broadband facilities and

services, and there is no possible justification for a change of course today, which would undermine the Commission’s successes.

## DISCUSSION

### I. THE COMMISSION’S WELL-REASONED DECISION NOT TO REQUIRE UNBUNDLING OF FTTP AND HYBRID LOOPS HAS PROMOTED ROBUST INVESTMENT IN BROADBAND NETWORKS

The Commission’s decisions not to mandate that ILECs unbundle their broadband networks — and, in particular, packetized transmission paths over FTTP and hybrid loops — were based not only on the conclusion that CLECs are not impaired without such access, but also on the reasonable determination that forced unbundling would blunt the incentives of all providers to invest in advanced broadband networks. The Commission’s predictive judgment has been borne out by events — since those decisions, the broadband marketplace has been characterized by extensive investment and ever more vigorous facilities-based competition.

#### A. The Commission Correctly Decided Not to Require Unbundling of FTTP and Hybrid Loops

In refusing to order unbundling of FTTP and hybrid loops, the Commission concluded that CLECs are not impaired without unbundled access to FTTP loops.<sup>3</sup> As recently as 2003, deployment of FTTP loops was “still in its infancy.”<sup>4</sup> Indeed, when the Commission adopted the

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<sup>3</sup> See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 275-276 (2003) (“*Triennial Review Order*” or “*TRO*”), *vacated in part and remanded*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”). In “overbuild” situations — where an FTTP loop is deployed to a home that was already being served by a copper loop — the Commission required ILECs to provide unbundled access to a narrowband transmission path over the FTTP loop if the copper loop was retired. *Id.* ¶ 277. That situation is not at issue here, as Cbeyond seeks unbundled access to a packetized, broadband capability.

<sup>4</sup> *Id.* ¶ 274.

*Triennial Review Order*, CLECs were significantly *ahead* of ILECs in rolling out FTTP loops.<sup>5</sup>

The Commission accordingly determined that, with respect to these network elements, “incumbent LECs do not have a first-mover advantage that would compound any barriers to entry.”<sup>6</sup> In rolling out FTTP loops, “[b]oth competitive LECs and incumbent LECs must obtain materials, hire the necessary labor force, and construct the fiber transmission facilities.”<sup>7</sup> Moreover, “the substantial revenue opportunities posed by FTT[P] deployment help ameliorate many of the entry barriers presented by the costs and scale economies.”<sup>8</sup> The Commission concluded that “[c]ompetitive LECs’ active participation in deploying FTT[P] loops demonstrates that carriers are not impaired if we refrain from unbundling these loops.”<sup>9</sup> The Commission similarly found that CLECs are generally not impaired without unbundled access to the packetized broadband capabilities of hybrid loops.<sup>10</sup>

In addition, drawing upon “an extensive record developed over more than two years,”<sup>11</sup> the Commission concluded that forced unbundling would deter investment by both ILECs and

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<sup>5</sup> *Id.* ¶ 275 (CLECs have “constructed some two-thirds or more of the FTTH loops throughout the nation.”).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* ¶ 276.

<sup>8</sup> *Id.* ¶ 274; *see also id.* ¶ 276 (“Besides providing narrowband services like voice, fax, and dial-up Internet access, competitive LECs could also deploy a wide-array of video and other broadband applications over such FTTH loops. . . . [T]he 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.”); *id.* ¶ 100 (noting that new entrants can maximize revenues by “choos[ing] which markets to enter and . . . avoid[ing] unattractive markets”).

<sup>9</sup> *Id.* ¶ 275.

<sup>10</sup> *See id.* ¶¶ 288-292. For hybrid loops, there are some circumstances in which the Commission has required narrowband unbundling, *see id.* ¶ 295, but those are not at issue here since Cbeyond is seeking access to a packetized, broadband transmission capability.

<sup>11</sup> *Id.* ¶ 272.

CLECs. The Commission found that 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.”<sup>12</sup> Moreover, the Commission recognized that, “with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market.”<sup>13</sup> Along similar lines, the Commission determined that, “with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis, competitive LECs will need to continue to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market.”<sup>14</sup>

The Commission’s policy judgment was informed by section 706 of the 1996 Act, which provides that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by, among other means, “remov[ing] barriers to infrastructure investment.”<sup>15</sup> In the *Triennial Review Order*, the Commission emphasized that its “obligation to ensure the deployment of advanced

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<sup>12</sup> *Id.* ¶ 3; see also *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) (“*USTA I*”) (“Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in relevant part) (Incumbents may not “undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement.”).

<sup>13</sup> *TRO* ¶ 272.

<sup>14</sup> *Id.*

<sup>15</sup> 47 U.S.C. §157 note (internal quotation marks omitted).

telecommunications capability under section 706 warrants different approaches with regard to existing [copper] loop plant and new [fiber] loop plant.”<sup>16</sup> The Commission concluded that “applying section 251(c) unbundling requirements 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 statutory goals authorized in section 706.”<sup>17</sup>

The Commission’s decisions not to mandate unbundling of FTTP and hybrid loops — and other broadband network elements — were repeatedly affirmed by the courts. The D.C. Circuit affirmed the *Triennial Review Order*’s treatment of FTTP and hybrid loops, holding that “the decision not to unbundle these elements was reasonable . . . in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband.”<sup>18</sup>

Since the *Triennial Review Order*, the Commission and the courts have consistently recognized that mandatory unbundling policies create a disincentive to investment in advanced broadband infrastructure. In 2004, the Commission held that its decision not to require unbundling of FTTP loops extended to residential multi-dwelling units, concluding that “[i]t would be inconsistent with the Commission’s goal of promoting broadband deployment to the mass market to deny this substantial segment of the population the benefits of broadband by retaining the regulatory disincentives associated with unbundling.”<sup>19</sup> The Commission also held

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<sup>16</sup> *TRO* ¶ 244.

<sup>17</sup> *Id.* ¶ 288.

<sup>18</sup> *USTA II*, 359 F.3d at 585.

<sup>19</sup> Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, 19 FCC Rcd 15856, ¶ 7 (2004).

that its refusal to mandate unbundling included fiber-to-the-curb (“FTTC”) loops; this policy was “necessary to ensure that regulatory disincentives for broadband deployment are removed for carriers seeking to provide advanced services to mass market customers using FTTC technology.”<sup>20</sup>

In 2004, the Commission granted forbearance from the unbundling obligations in § 271 to the extent they required unbundling of broadband elements. In reaching this conclusion, the Commission found that “the preconditions for monopoly” were not present in the broadband market because of “actual and potential intermodal competition” from cable operators and wireless providers.<sup>21</sup> Moreover, “[i]n light of the competitive benefit of the BOCs’ continued investment in fiber-based broadband facilities, the disincentives associated with regulated broadband unbundling under section 271 support our decision to grant forbearance from those requirements.”<sup>22</sup> The D.C. Circuit affirmed the *271 Broadband Forbearance Order*, concluding that the Commission’s “predictions about the development of new broadband technologies and about the incentives for increased deployment (and, in turn, increased competition) flowing from an absence of unbundling are well within the agency’s area of expertise.”<sup>23</sup>

In 2005, the Commission determined that facilities-based wireline broadband service should be classified as an “information service” that is not subject to common-carrier regulations

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<sup>20</sup> Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293, ¶ 9 (2004).

<sup>21</sup> Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 22 (2004) (“*271 Broadband Forbearance Order*”).

<sup>22</sup> *Id.* ¶ 25; *see also id.* ¶ 21 (Commission was “mindful of the disincentive effects of unbundling on BOC investment, and believe[d] that the beneficial effect of unbundling [was] small” in light of robust competition in the retail market for broadband service).

<sup>23</sup> *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006).

under Title II of the Act.<sup>24</sup> The Commission explained that “the record shows that the existing regulations constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services.”<sup>25</sup> The Third Circuit denied several petitions for review, holding that the *Wireline Broadband Order* was “a proper exercise of agency discretion” and “based on a reasonable interpretation of the [Act].”<sup>26</sup>

**B. Since the *Triennial Review Order*, Providers Have Made Massive Investments in Advanced Broadband Networks, and Facilities-Based Competition Has Flourished**

As predicted, the Commission’s decision not to require unbundling has promoted robust private investment in broadband networks that has increased the speed and quality of existing networks, extended coverage to even more homes and businesses, and resulted in lower prices for consumers.<sup>27</sup>

The data speak for themselves. Since 2003, broadband penetration has nearly tripled, from 23 percent of households to 66 percent of households.<sup>28</sup> The number of high-speed Internet lines (including both business and residential customers) increased nearly six-fold between 2003

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<sup>24</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005).

<sup>25</sup> *Id.* ¶ 19.

<sup>26</sup> *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 208 (3d Cir. 2007).

<sup>27</sup> See Simon Flannery, et al., Morgan Stanley, *Telecom Services: 1Q Trend Tracker: Earnings Resilience Supports Outperformance Potential* 50 (June 5, 2009) (“We believe the competitive landscape in broadband will continue to pressure carriers to increase their offered speeds, likely leading to rising [capital expenditure] requirements at the telcos.”); see also John B. Horrigan, Pew Internet and American Life Project, *Home Broadband Adoption 2008*, v (July 2008) (“Monthly broadband bills are 4% lower in May 2008 than at the end of 2005.”).

<sup>28</sup> See Robert C. Atkinson & Ivy E. Schultz, Columbia Inst. For Tele-Info., *Broadband in America: Where it is and Where it is Going* 25-26 (Nov. 11, 2009) (“*CITI Report*”).

and 2008, from 23 million to 132.8 million.<sup>29</sup> Between 2006 and 2008, BOCs' capital expenditures on broadband grew from \$7.2 billion to \$11.9 billion, a 65 percent increase.<sup>30</sup> Investment by CLECs has increased as well — six of the largest CLECs plan to invest a combined \$1 billion in 2010, up roughly 66% from their combined investment in 2004.<sup>31</sup> Since the Commission's decision not to require unbundling for broadband infrastructure, overall investment in communications equipment in the United States has increased by more than 40 percent.<sup>32</sup>

The growth in fiber deployment has been even more explosive. Incumbent LECs such as Verizon relied on the Commission's rulings when deciding to invest tens of billions of dollars to deploy new fiber-based networks, free of the threat of free-riding by CLECs through mandated unbundling. Between 2003 and 2007, ILECs deployed more than 280,000 kilometers of fiber.<sup>33</sup> In 2003, there were just 110,000 fiber lines in the United States, but by 2008 that figure had grown to 2.3 million.<sup>34</sup> By September 2009, 5.3 million homes were receiving broadband

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<sup>29</sup> See Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2008*, Table 1 (July 2009) (“*High-Speed Services for Internet Access*”).

<sup>30</sup> *CITI Report* at 30, Table 5; see also *id.* at 11 (“Market researchers and investment analysts recently estimated that as much as two-thirds of current investments are being made to provide and expand wired and wireless broadband, and the trend over the past few years has been growing.”) (footnote omitted).

<sup>31</sup> See Collins Stewart, LLC, *Telecom Services: Telecom Services Initiation* 39 (Oct. 19, 2009) (providing capital expenditure data for Cbeyond, Cogent Communications, Global Crossing, Level 3, PAETEC, and TW Telecom).

<sup>32</sup> See Jeffrey A. Eisenach, The Progress & Freedom Foundation, *Broadband Policy: Does the U.S. Have It Right After All?* 9-10 & Fig. 2 (Sept. 2008).

<sup>33</sup> See FCC, ARMIS Infrastructure Report, FCC Report 43-07, Table II. The cited figure (280,000 kilometers) refers to “sheath kilometers” of fiber. Given that one sheath may contain multiple strands of fiber, this number may actually *understate* the total amount of fiber that ILECs have deployed.

<sup>34</sup> See *High-Speed Services for Internet Access*, Table 2.

service over fiber loops, an increase of more than 40 percent in *one year*.<sup>35</sup> Verizon in particular has committed \$23 billion to its all-fiber FiOS network, which will ultimately offer 50 Mbps (and higher) broadband service to more than 19 million premises; FiOS is currently available to 14.5 million homes and businesses, and 3.3 million customers subscribe to this service.

This boom in investment in fiber broadband infrastructure has not been limited to incumbent LECs. According to the Fiber-to-the-Home Council, there are currently 681 facilities-based providers offering fiber broadband service; collectively, these providers serve 1.1 million customers.<sup>36</sup> Competitive LECs are aggressively courting business customers as well — there is an average of six fiber-based broadband providers in each of the fifty largest MSAs, and CLECs have deployed over a hundred thousand route miles of fiber to tens of thousands of office buildings.<sup>37</sup> Those providers have announced ambitious plans to upgrade and expand their networks to bring fiber-based service to even more business customers.<sup>38</sup>

Cbeyond's assertion that the current marketplace does not adequately serve small-business customers is wrong. Verizon has long been aware of the unique issues facing small and medium-sized businesses, and offers a number of products and services that are specifically tailored to the needs of these customers. Verizon's Small Business group markets communications services to businesses with up to 20 employees, and the Medium Business

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<sup>35</sup> See Steven S. Ross, *908,000 New FTTH Customers! A Record Summer for Fiber, Broadband Properties* 22 (Oct. 2009) (citing data from RVA LLC).

<sup>36</sup> See RVA LLC, *Fiber-To-The-Home: North American Market Update* 9-10 (Apr. 2009). This number includes CLECs that are divisions of ILECs.

<sup>37</sup> See U.S. Telecom, *High-Capacity Services: Abundant, Affordable, and Evolving* 24-25 & Table 7 (July 2009) ("*U.S. Telecom Report*"), available at [http://ustelecom.org/uploadedFiles/News/News\\_Items/High.Capacity.Services.pdf](http://ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf).

<sup>38</sup> See *id.* at 27-33.

group offers services for businesses with 20 to 1000 employees.<sup>39</sup> Indeed, Verizon offers small businesses almost all of the services that Cbeyond purports to offer, including business email, data storage and protection, video services, web hosting, remote access, collaboration tools, and conferencing applications.<sup>40</sup> AT&T and Qwest also offer a variety of different broadband packages that are specifically designed for small-business customers.<sup>41</sup>

The five largest cable companies also serve nearly one million business customers, and revenue from business services (currently \$3 billion) is growing by 15-20 percent per year.<sup>42</sup> In the third quarter of 2009, Comcast's business service revenue was 49 percent higher than the year before, and Cablevision's business revenue has been growing at 40 percent or more per year for the last several years.<sup>43</sup> Cable providers have divisions that specifically target business customers; such customers are seen as an extremely important market segment.<sup>44</sup> Contrary to

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<sup>39</sup> See <http://smallbusiness.verizon.com/>; <http://mediumbusiness.verizon.com>.

<sup>40</sup> Compare *Cbeyond Petition* at 18 (noting that Cbeyond plans to offer “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”).

<sup>41</sup> See <http://smallbiz.att.com/businessuverse/> (marketing AT&T's fiber-based U-verse service to small businesses); [http://businessesales.att.com/products/merch\\_internet.jhtml](http://businessesales.att.com/products/merch_internet.jhtml) (offering DSL and T1 connections designed for small businesses); <http://www.qwest.com/smallbusiness/products/index.html>.

<sup>42</sup> See *U.S. Telecom Report* at 9; see also *id.* at 14-15, Table 3 (summarizing business services offered by the five largest cable companies); *271 Broadband Forbearance Order* ¶ 22 (“[C]able operators have had success in acquiring not only residential and small-business broadband customers, but increasingly large business customers as well.”).

<sup>43</sup> See Comcast 3rd Quarter 2009 Results Slides at 11 (Nov. 4, 2009); Final Transcript of CVC – Cablevision Systems Corp. at Bank of America Securities Media, Communications & Entertainment Conference at 11 (Sept. 9, 2009).

<sup>44</sup> See Jessica Reif Cohen, Bank of America/Merrill Lynch, *The Enterprise: Cable's Next Frontier* 4 (Sept. 9, 2009) (“We forecast Cable to double its market share in [small and medium enterprises] from 7% in 2008 to 14% in 2011, with revenues projected to increase from \$2.3bn to

Cbeyond's assertion that cable companies are neglecting small businesses, "the cable operators have made [small and medium-sized businesses] their primary growth initiative."<sup>45</sup> Indeed, cable operators are Verizon's primary competitors in the small and medium-sized business market segment. Each of the major cable companies is currently rolling out fiber, and "their extensive cable networks and operations give them a considerable advantage in deploying fiber to business locations."<sup>46</sup> "Because of the proximity of their networks to business customers and the types of services they are able to offer over their networks, cable operators are competing *particularly aggressively* for the small and medium-sized businesses that are the primary retail customers for the ILECs' DS-1 and DS-3 special access services."<sup>47</sup>

Fixed wireless providers are also intensely pursuing business customers. As the Commission has recognized, "fixed wireless offers the potential of being a cost-effective substitute for fiber as a last-mile connection to commercial buildings."<sup>48</sup> Many business

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\$5.3bn, respectively. . . . Indeed, we expect Cable to target [small and medium enterprise] market share at or above its 30% share in residential data and voice.").

<sup>45</sup> Craig Moffett et al., Bernstein Research, *U.S. Telecom: Enterprise Services . . . Time for a Star Turn?* 17 (Mar. 25, 2008); *see also U.S. Telecom Report* at 15-16 (summarizing major cable operators' strategies for pursuing small and medium-sized businesses).

<sup>46</sup> *U.S. Telecom Report* at 10.

<sup>47</sup> *Id.* at 15 (emphasis added). For a sample of the top cable operators' business offerings, *see*: <http://business.comcast.com/medium/index.aspx> (Comcast); <http://www.lightpathnow.com/default.html> (Cablevision); <https://www.twcbc.com/nyc/businesssolutions/mediumbusiness.html> (Time Warner).

<sup>48</sup> Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, ¶ 48 (2007); *see also U.S. Telecom Report* at 16-17 (Businesses "can use fixed wireless to obtain access to voice and high-speed data services, and other carriers can often use fixed wireless to extend their existing fiber networks quickly and efficiently."); *id.* at 19 (FiberTower executive stated that with fixed wireless "[y]ou can literally cover over a hundred miles and you're talking less than \$100,000 in equipment rather than the millions to put in fiber.") (internal quotation marks omitted).

customers now consider fixed wireless service to be a competitive alternative to fiber.<sup>49</sup> This service — which is available in urban and suburban areas as well as “areas in which demand tends to be less concentrated” — is also “a particularly attractive substitute for the ILECs’ DS-1 and DS-3 special access services.”<sup>50</sup> More than a dozen fixed wireless providers currently offer service throughout the country, and these firms are rapidly deploying service to new areas and expanding coverage within existing markets.<sup>51</sup> Nearly all of these carriers offer high-speed broadband service to small, medium, and large businesses. These providers “offer high-speed connections ranging from DS-1 to Gigabit Ethernet to OCn. Some specifically offer speeds (such as 8 Mbps) that are in between the standard DS-1 and DS-3 offerings specifically to appeal to businesses whose needs fall in between this range.”<sup>52</sup>

In addition, mobile wireless providers are investing heavily in deploying 4G wireless broadband networks, which offer speeds that are attractive to small and medium businesses. In 2010, Verizon intends to extend 4G coverage to roughly 100 million customers in 30 different markets; by 2013, Verizon’s entire footprint will have 4G coverage.<sup>53</sup> Sprint already provides 4G service to 27 markets and plans to expand coverage to Boston, Houston, New York, San

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<sup>49</sup> See Comments of Verizon and Verizon Wireless on Special Access Rates for Price Cap Local Exchange Carriers 24-25, WC Docket No. 05-25 (filed Jan. 19, 2010).

<sup>50</sup> *U.S. Telecom Report* at 17.

<sup>51</sup> See *id.* at 17-19, Tables 4-5. FiberTower increased its customer base by 39% between 2008 and 2009; Covad Wireless currently serves 4,000 small and medium-sized businesses, and Airband serve 3,500 businesses in 15 major markets. See *id.* at 22-23.

<sup>52</sup> *Id.* at 20 (citation omitted); see also *id.* at 21-22, Table 6 (summarizing fixed wireless providers’ current service offerings).

<sup>53</sup> See Marguerite Reardon, CNet News, *Verizon Completes Initial 4G Wireless Test*, (Aug. 14, 2009), [http://news.cnet.com/8301-1035\\_3-10310232-94.html](http://news.cnet.com/8301-1035_3-10310232-94.html).

Francisco, and Washington, DC in 2010.<sup>54</sup> By the end of the year, Clearwire’s 4G network will cover 120 million people in 80 markets.<sup>55</sup>

In sum, the Commission’s predictive judgments have been proven correct. Since the *Triennial Review Order*, both ILECs and CLECs have made major investments to expand and upgrade their networks, and intermodal competition has flourished. There is simply no reason to disrupt the market and discard the policies that have laid the foundation for this success.

## **II. THE COMMISSION SHOULD REJECT CBeyond’S PROPOSAL TO IMPOSE BROADBAND UNBUNDLING OBLIGATIONS ON ILECS, ALONE AMONG PROVIDERS OF BROADBAND NETWORKS**

### **A. Cbeyond Makes No Showing that the Impairment Standard Is Satisfied**

1. Congress did not authorize the Commission to make an open-ended judgment that “more unbundling is better” — it instead “made ‘impairment’ the touchstone.”<sup>56</sup> The burden is on CLECs to submit “substantial evidence” demonstrating that competitors would be impaired without unbundled access to a particular network element.<sup>57</sup> Without a showing of impairment, the Commission may not require unbundling.<sup>58</sup> The critical question under the impairment standard is whether competitors are *capable* of competing without UNEs — impairment does not

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<sup>54</sup> See News Release, Sprint, *Sprint 4G Rollout Blazes on with Maui Launch* (Dec. 1, 2009), available at [http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle\\_newsroom&ID=1360459](http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1360459).

<sup>55</sup> See Simon Flannery & Sean Ittel, Morgan Stanley, *Clearwire Corporation: 2Q09 Preview: Market Rollout and Wholesale Launches Progressing* 4 (Aug. 10, 2009).

<sup>56</sup> *USTA I*, 290 F.3d at 425; see also *TRO* ¶ 72 (“Congress did not create a general duty to unbundle.”); *Iowa Utils. Bd.*, 525 U.S. at 391-92 (rejecting the notion of “some underlying duty to make all network elements available”).

<sup>57</sup> *USTA II*, 359 F.3d at 582.

<sup>58</sup> See 47 U.S.C. § 251(d)(2) (In determining which network elements must be made available as UNEs, “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.”).

exist when “competition is possible” without UNEs.<sup>59</sup> Indeed, “[t]he fact that CLECs *can* viably compete without UNEs . . . *precludes* a finding that the CLECs are impaired.”<sup>60</sup>

As the evidence detailed above shows, providers are demonstrably capable of deploying their own fiber loops — or high-speed broadband wireless “loops” — and using those loops to compete successfully. CLECs, cable operators, and fixed and mobile wireless providers are all deploying broadband networks and aggressively marketing broadband services using those networks to business customers.<sup>61</sup> These providers are doing so, moreover, without unbundled access to FTTP and hybrid fiber loops. This evidence that facilities-based competition is not only possible — but is flourishing — precludes the Commission from finding that impairment exists for FTTP and hybrid fiber loops.

In addition, the Commission has previously rejected proposals such as Cbeyond’s, which seek unbundling in order to suit a particular business model. In the *Triennial Review Order*, the Commission emphasized that it “will not . . . evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs.”<sup>62</sup> The

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<sup>59</sup> *USTA II*, 359 F.3d at 575; *see also* 47 U.S.C. § 251(d)(2)(B) (unbundling required only when competitors lack the “ability” to provide service without access to UNEs).

<sup>60</sup> *Covad Communications Co. v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006) (internal quotation marks omitted, emphases added).

<sup>61</sup> Indeed, Cbeyond itself asserts that it “has been able to achieve substantial market share, up to approximately 15 percent of businesses with between 5 and 250 employees in mature markets, by offering service exclusively via T-1 loops.” *Cbeyond Petition* at 16-17. The fact that Cbeyond has achieved such a significant portion of this market segment — and has signed “46,000 small businesses” as customers, Declaration of Brooks Robinson on Behalf of Cbeyond Inc. ¶ 2 (Nov. 16, 2009) (*Cbeyond Petition*, Attach. A) — *without* access to unbundled FTTP and hybrid loops simply confirms that there is no impairment here.

<sup>62</sup> *TRO* ¶ 115; *see also Iowa Utils. Bd.*, 525 U.S. at 430 (Breyer, J., concurring in relevant part) (“Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risks costs that, in terms of the Act’s objectives, may make the game not worth the candle.”).

Commission recognized that “a carrier- or business plan-specific approach would be administratively unworkable for regulators, incumbent LECs, and new entrants alike because it would require case-by-case determinations of impairment and continuous monitoring of the competitive situation.”<sup>63</sup> Moreover, attempting to require unbundling only when used to serve small businesses (or only to provide a particular set of products to that class of customer) — as Cbeyond requests here — would also raise difficult and costly issues of implementation, as ILECs and regulators would need means of ensuring that a CLEC does not use such a newly unbundled loop for a different class of customer or a different product line.

**B. The Costs of Unbundling Fiber Loops Would Far Outweigh Any Conceivable Benefits**

1. Even aside from the fact that Cbeyond has made no showing that the statutory impairment standard is satisfied, the Commission could not impose unbundling without also finding that the benefits of unbundling outweigh the costs. For example, the D.C. Circuit has held that unbundling may not be mandated, even if in the face of *some* degree of impairment, where unbundling “would pose excessive impediments to infrastructure investment.”<sup>64</sup> The Commission has likewise held that it cannot impose unbundling obligations “where some level of impairment may exist, but unbundling appear[s] likely to undermine important goals of the 1996 Act.”<sup>65</sup>

The costs of mandatory unbundling requirements for fiber loops would far outweigh any purported benefits. As discussed above, the Commission and the courts have repeatedly

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<sup>63</sup> *TRO* ¶ 115.

<sup>64</sup> *USTA II*, 359 F.3d at 580; *see also id.* at 583 (“Even if the CLECs are impaired with respect to FTTH deployment (a point we do not decide), the § 706 considerations that we upheld as legitimate in the hybrid loop case are enough to justify the Commission’s decision not to unbundle FTTH.”).

<sup>65</sup> *TRO* ¶ 173

concluded that unbundling deters investment by both ILECs and CLECs — incumbents are less likely to invest in upgrading their networks if they must share those facilities with their rivals, and CLECs have no incentive to build their own networks as long as they can gain access to incumbents’ facilities at below-market prices.<sup>66</sup> Under Cbeyond’s proposal, CLECs would bear no risk whatsoever; they could simply stop purchasing the requested services whenever their business models became unprofitable or they sought to focus their resources elsewhere. ILECs, in contrast, would still bear the full downside risk of investing in next-generation networks. Moreover, imposing unbundling obligations on only one broadband network provider — among the many broadband platform providers that exist today — would further skew investment incentives and competition among broadband platforms. In a marketplace where all providers are making large and risky investments in deploying new networks, it makes no sense to saddle only one set of providers with costly unbundling mandates.

In addition to those investment disincentives, unbundling is also “an especially intrusive form of economic regulation — one that is among the most difficult to administer.”<sup>67</sup> As Justice Breyer has explained, “[e]ven the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing.”<sup>68</sup> The D.C. Circuit has acknowledged “the tangled management inherent in shared use of a common resource.”<sup>69</sup> ILECs forced to unbundle network elements also incur “the costs

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<sup>66</sup> *See id.* ¶ 272.

<sup>67</sup> Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 36 (2005), *aff’d*, *Covad*, 450 F.3d 528; *cf. AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (“[E]ven the Commission recognizes that regulatory uncertainty . . . in itself may discourage investment and innovation regarding the very technologies Congress intended to promote.”) (internal quotation marks omitted).

<sup>68</sup> *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in relevant part).

<sup>69</sup> *USTA I*, 290 F.3d at 429.

of constructing . . . broadband facilities in a fashion that will allow the [ILEC] to satisfy whatever access requirements might foreseeably be imposed . . . as well as the significant costs that can be associated with regulatory proceedings themselves.”<sup>70</sup>

Cbeyond asserts that unbundled fiber loops could be provided “in a manner that largely eliminates the need for complex engineering” — that is, via “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 the bit stream and carry it back to its network.”<sup>71</sup> In other words, Cbeyond wishes to provide packetized broadband service to an entire LATA from a *single* point of interconnection with an ILEC. If this request were granted, Cbeyond and other CLECs would have no need to build their own facilities in the specific areas where they were serving customers; it is difficult to imagine a greater disincentive to CLEC deployment of broadband facilities.

Another flaw with Cbeyond’s claim is that the service sought by Cbeyond — a 6 to 10 Mbps bit stream transmission path from small-business end users to a central aggregation point in the LATA — simply does not exist. Nor do any industry standards exist for the creation of such an unbundled pathway traveling along side Verizon’s own services over its FTTP and hybrid loops. Far from “eliminat[ing] the need for complex engineering,” Cbeyond’s proposal would impose substantial costs on incumbent LECs.

Cbeyond’s request for access to a portion of the packetized bandwidth of incumbents’ networks would impose other costs as well. As the Commission’s experience with line sharing revealed, when two companies are providing service to a single customer over the same facilities

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<sup>70</sup> 271 *Broadband Forbearance Order* ¶ 25.

<sup>71</sup> *Cbeyond Petition* at 21-22.

— as Cbeyond seems to contemplate here — there are difficult management issues regarding diagnosis and repair of any network problems, in addition to the general administrative problems inherent in forced sharing. The difficulties would be even greater here, where Cbeyond proposes to share not merely a loop, but also packetized transport and packetized switching capabilities. For example, Verizon’s network is not currently set up to segregate and route multiple providers’ packetized traffic over a shared facility; adding these capabilities would require the development of new hardware, software, and traffic management processes to avoid interference and ensure proper routing. In addition, Cbeyond’s proposal — which could result in commercially sensitive information being transported across shared network facilities — would also require the implementation of new measures for keeping such data secure.

2. Cbeyond relies on a report from Economics and Technology, Inc. (“ETI”) to assert that the Commission’s refusal to mandate broadband unbundling has not led to an anticipated increase in investment.<sup>72</sup> The ETI report asserts that ILEC and CLEC capital investment has decreased sharply since 2001 and that ILEC network investments were approximately 30% lower between 2002 and 2007 than between 1996 and 2001.<sup>73</sup> There are at least two clear flaws with these claims. First, the baseline ETI chose — 1996 to 2001 — represents the very peak of the Internet bubble, a period that was characterized by “a manic

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<sup>72</sup> See *Cbeyond Petition* at 14-16 (citing 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* 21-28 (Mar. 2009) (“*ETI Study*”)).

<sup>73</sup> *Cbeyond Petition* at 15. The *ETI Study* bemoans a “large-scale cutback in investment” by ILECs, even as it grudgingly concedes — in a footnote — that Verizon and AT&T have now made fiber-based broadband service available to 27 million households. *ETI Study* at 19 n.28, 20. It is also unclear exactly what ETI means when it faults ILECs for making investments that are “more evolutionary than revolutionary.” *Id.* at 22. The Commission never promised that its rules would lead to “revolutionary” changes; rather, it predicted — correctly — that its policy would lead to consistent increases in the speed, quality, and availability of broadband service.

phase of over-investment and overbuilding.”<sup>74</sup> Second, the Commission’s decision not to require unbundling of FTTP and hybrid loops was announced in the *Triennial Review Order* in 2003 and affirmed by the D.C. Circuit in 2004. It was not until this time that ILECs could be certain they would not have to share elements of their advanced broadband networks with CLECs. Any evaluation of the effects of the Commission’s decisions on investment incentives must use 2003 or 2004 as the baseline; as explained above, and as other studies confirm, since the *Triennial Review Order*, both fiber deployment and broadband investment more generally have grown significantly.

Cbeyond also relies on the Berkman Study<sup>75</sup> to contend that the experience of other countries shows that the benefits of unbundling outweigh the costs. As Verizon and others have explained at length elsewhere, the Berkman Study is badly flawed and distorts evidence about the factors driving broadband deployment in other countries.<sup>76</sup> It is not necessary to repeat all of

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<sup>74</sup> Larry F. Darby et al., *The CLEC Experiment: Anatomy of a Meltdown 7* (Sept. 23, 2002), available at <http://www.pff.org/issues-pubs/pops/pop9.23clecexperiment.pdf> (internal quotation marks omitted). This investment binge was clearly not sustainable over the long run. The total market capitalization of publicly traded CLECs fell by 87% between 2001 and 2002. *See id.* at 5. CLECs made more than \$25 billion in investments between 1996 and 2001, but by 2002, many of those assets had “simply been withdrawn and lay fallow,” and their value was “substantially below the cash used to acquire them.” *Id.* at 13.

<sup>75</sup> *See* 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) (“*Berkman Study*”), available at [http://www.fcc.gov/stage/pdf/Berkman\\_Center\\_Broadband\\_Study\\_13Oct09.pdf](http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf).

<sup>76</sup> *See* Comments of Verizon and Verizon Wireless on Study by the Berkman Center for Internet and Society, GN Docket Nos. 09-47 et al. (filed Nov. 16, 2009) (“*Verizon Berkman Comments*”); *see also* Comments of AT&T Inc. on Berkman Center Report 1, GN Docket Nos. 09-47 et al. (filed Nov. 16, 2009) (“In light of [its] many failings, the Commission cannot rationally rely upon the [Berkman Study’s] analysis or conclusions in formulating the National Broadband Plan.”); Declaration of Robert W. Crandall, Everett M. Ehrlich & Jeffrey A. Eisenach Regarding the Berkman Center Study (NBP Public Notice 13) 56, GN Docket Nos. 09-47 et al. (filed Nov. 16, 2009) (“Crandall et al. Decl.”) (The Berkman Study “is neither rigorous nor impartial, but instead presents a highly opinionated, and in many respects demonstrably

those criticisms here, but Verizon will respond briefly to Cbeyond’s specific contentions about the effects of unbundling in various other countries.

*First*, Cbeyond identifies Japan, Denmark, Norway, Sweden, and the Netherlands as countries in which unbundling has led to strong broadband deployment. But Japan is *behind* the United States in terms of broadband penetration, despite the favorable demographics of that country — *i.e.*, a dense, wealthy population that mostly lives in multi-dwelling units.<sup>77</sup> And, in addition to unbundling requirements, Denmark, Norway, Sweden, and the Netherlands also have extensive facilities-based competition, favorable demographics, active government funding of broadband, and well-developed high-technology industries.<sup>78</sup> Those factors may have been far more important than unbundling in achieving high rates of broadband deployment.

*Second*, Cbeyond identifies Germany and Canada as countries in which broadband deployment has lagged in the absence of effective unbundling policies. Germany is a poor comparison because, unlike the United States, it does not have significant facilities-based competition from cable companies.<sup>79</sup> And Canada has achieved the highest level of broadband penetration of all the G7 countries even though it is “‘largely typified by facilities-based competition, not by unbundled access.’”<sup>80</sup>

*Third*, Cbeyond completely ignores the many countries that undermine its theory. Even the Berkman Study concedes that “Switzerland’s experience suggests that, under the right

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incorrect, portrayal of the evidence as it relates to the effects of public policy on broadband penetration and other key indicators of performance in the broadband market.”).

<sup>77</sup> See *Verizon Berkman Comments* at A-1 – A-2.

<sup>78</sup> See *id.* at A-4 – A-6; see also Crandall et al. Decl. at 33-36 (The Berkman Study’s “discussion of even the ‘best’ performers is not persuasive.”).

<sup>79</sup> See *Verizon Berkman Comments* at A-7.

<sup>80</sup> *Id.* at A-9 (quoting *Berkman Study* at 110).

conditions, a country can do very well without effectively enforced open access regulation.”<sup>81</sup>

And Cbeyond fails to mention Italy, Spain, Austria, Hungary, and Portugal, in which broadband penetration remains relatively weak despite those countries’ adoption of unbundling policies.<sup>82</sup>

*Lastly*, Cbeyond ignores empirical research by some of the leading academics in the field that casts grave doubt upon the wisdom of mandatory unbundling. Economists Jerry Hausman and J. Gregory Sidak conducted a detailed review of network unbundling policies in the U.S., U.K., New Zealand, Canada, and Germany, and concluded that *none* of the major rationales for unbundling — such as promoting retail competition and enabling future facilities-based competition — were supported by the empirical evidence.<sup>83</sup> Another study of broadband policy in OECD countries found that “the statistical evidence does not support claims by proponents of unbundling that this regulatory tool results in higher broadband penetration rates.”<sup>84</sup> Similarly, a recent article by Scott Wallsten and Stephanie Hausladen — which analyzed the effects of unbundling policies on fiber deployment in 27 European countries — concluded that: “[C]ontrolling for income, country fixed effects and time fixed effects, countries with more broadband connections per capita provided through local loop or bitstream unbundling have fewer fiber connections . . . per capita provided by the incumbents and entrants. Conversely, in countries where entrants provide broadband over their own DSL or cable infrastructure,

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<sup>81</sup> *Berkman Study* at 111.

<sup>82</sup> *See Verizon Berkman Comments* at A-9 & n.97.

<sup>83</sup> *See* Jerry Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1(1) *Journal of Competition Law & Economics* 173, 245 (2005).

<sup>84</sup> Harold Ware & Christian Dippon, NERA Economic Consulting, *Wholesale Unbundling and Intermodal Competition* 11 (Jan. 7, 2010).

incumbents provide more fiber.”<sup>85</sup> Just as the Commission predicted in the *Triennial Review Order*, carriers are more likely to invest in advanced broadband facilities when they are not forced to share the fruits of that investment with their rivals.

**C. Cbeyond’s Proposal to Pay “Retail” Rates for Unbundled Fiber Loops Would Not Alleviate Disincentives to Investment**

Cbeyond contends that any investment disincentives would be minimized if carriers seeking unbundled access to fiber loops were required to pay “the lowest retail price offered by the incumbent LEC in the relevant MSA.”<sup>86</sup> As an initial matter, if there were an existing retail product that provided the service Cbeyond seeks through unbundling, it could purchase that product today. But if, as explained above, the service that Cbeyond wants ILECs to be required to supply simply does not exist, there is no existing “retail price” for that service. As a result, what Cbeyond is seeking to do is to transplant an end-user retail rate — set in the marketplace based on the particular characteristics of that offering and competitive offerings from other providers — to a completely different service, a packetized pathway for serving small businesses throughout a LATA.

Indeed, regardless of the exact rate it is proposing, what *is* clear is that Cbeyond wants access to fiber loops at a *lower* price than it could obtain through arms-length negotiations in the

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<sup>85</sup> Scott Wallsten & Stephanie Hausladen, *Net Neutrality, Unbundling, and Their Effects on International Investment in Next-Generation Networks*, 8(1) *Review of Network Economics* 90, 102 (Mar. 2009); *see also* Eisenach, *Broadband Policy: Does the U.S. Have It Right After All?* 10-11 & Fig. 3 (noting that, since 2003, ILECs’ per-line capital investment has been higher in the United States than the European Union); Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7(4) *Review of Network Economics* 460, 477 (Dec. 2008) (“Investment incentives, broadly construed, appear relatively elastic, even in the short run, with respect to network sharing mandates,” and “the rapid growth of DSL services in the wake of line sharing’s repeal presents a strong case for protecting such growth dynamics in public policy.”).

<sup>86</sup> *Cbeyond Petition* at 21.

marketplace. But in the absence of impairment, “the market price should prevail, as opposed to a regulated rate.”<sup>87</sup> Mandating *any* below-market rates — even if those rates are above TELRIC prices — would create a disincentive to investment in fiber loops. As the D.C. Circuit has held, “even if unbundling under [above-TELRIC prices] would produce marginally less disincentive, the FCC reasonably concluded that there would still be a significant deterrent due to costs inherent in complying with any unbundling mandate.”<sup>88</sup>

**D. Reversal of Settled Unbundling Policy Would Raise Serious Constitutional Issues under the Takings and Due Process Clauses**

An about face on fiber unbundling would also raise serious constitutional issues. In recent years, Verizon and other incumbent LECs have made massive investments in advanced broadband infrastructure. Those providers — who, of course, bear the full *risk* of their investments — relied upon the Commission’s unambiguous assertion that they would also be able to reap the full *rewards* of those investments without being forced to share advanced network elements with competitors. Having watched ILECs make those investments and bear those risks, Cbeyond now seeks to share in the rewards, without incurring any risk of its own.

A reversal of this settled unbundling policy would thus punish incumbent LECs for their reasonable reliance. The Supreme Court has emphasized that a decision to “switch back and forth” between regulatory regimes “in a way which required investors to bear the risk of bad investments at some times while denying them the benefits of good investments at others would

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<sup>87</sup> Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 473 (1999), *vacated and remanded on other grounds, USTA I*, 290 F.3d 415.

<sup>88</sup> *EarthLink*, 462 F.3d at 13.

raise serious constitutional questions.”<sup>89</sup> That is *precisely* what would occur if the Commission — after inducing incumbent LECs to invest tens of billions of dollars in fiber infrastructure — denied them the benefits of that investment by imposing forced-sharing requirements. Unlike the constitutional challenges to the Commission’s TELRIC rules — which the Supreme Court rejected while noting that there was no “‘switch’ of methodologies,” no “opportunistic switch ‘back and forth,’ ” and no “promise” by the government to use a particular methodology<sup>90</sup> — the reversal of course that Cbeyond now urges on the Commission would raise substantial questions under the Takings and Due Process Clauses.

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<sup>89</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989); *cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996) (allowing breach of contract claims when the government eliminated an accounting rule that had induced healthy banks to take over failing banks during the savings and loan crisis).

<sup>90</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 527-28 (2002).

**CONCLUSION**

For the foregoing reasons, the Commission should deny the petition.

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