

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:)
)
Cbeyond, Inc. Petition for Expedited) WC Docket No. 09-223
Rulemaking to Require Unbundling of)
Hybrid, FTTH, and FTTC Loops)
Network Elements Pursuant to 47)
U.S.C. §251(c)(3) of the Act)

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Craig J. Brown
Harisha J. Bastiampillai
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6671
Craig.Brown@qwest.com
Harisha.Bastiampillai@qwest.com

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

January 22, 2010

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THE COMMISSION’S RULES REGARDING FIBER AND HYBRID LOOPS HAVE PROMOTED COMPETITION AND INVESTMENT	3
A. The Commission’s Rules are in Accord with the Letter and Spirit of the Telecommunications Act of 1996.	3
B. The Commission’s Predictive Judgment Has Been Borne Out.....	7
C. There Has Been Substantial ILEC Fiber Investment in the Post- <i>Triennial</i> <i>Review Order</i> Years.	15
D. Re-imposing Unbundling Requirements for Fiber and Hybrid Loops Would Discourage Future Investment, Reducing Consumer Welfare.....	22
E. CLECs are Not Impaired Without Access to Unbundled Fiber and Hybrid Loops.....	25
F. The Costs of Providing the Access Beyond Seeks Far Outweigh the Benefits.....	30
III. CONCLUSION	32

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:)
)
Cbeyond, Inc. Petition for Expedited) WC Docket No. 09-223
Rulemaking to Require Unbundling of)
Hybrid, FTTH, and FTTC Loops)
Network Elements Pursuant to 47)
U.S.C. §251(c)(3) of the Act)

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

I. INTRODUCTION AND SUMMARY

Qwest Communications International Inc. (Qwest) submits these comments in accord with the Federal Communications Commission's (Commission) *Public Notice* in the above-referenced docket.¹

Cbeyond characterizes the Commission's "deregulation" of fiber and hybrid loops as an unsuccessful "experiment" -- an experiment that should be ended. However, Cbeyond supports its advocacy with the flimsiest of "evidence." First, the deregulation (*i.e.*, the finding of non-impairment for fiber and hybrid loops) was by no means an "experiment" -- the Commission conducted its impairment analysis under the prescriptions set forth in the Telecommunications Act of 1996 and as interpreted by the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit. Second, the "experiment" was not a failure; in fact, under any reasonable standard, it would have to be viewed as a significant success and one of the most integral measures in fueling the deployment of broadband in the last five years. This "experiment" has spurred significant capital investment in fiber facilities, as described below. The very fact that this investment has occurred despite challenging economic and market conditions indicates that this

¹ *Public Notice*, WC Docket No. 09-223, "Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Filed by Cbeyond, Inc.", DA 09-2591 (Dec. 14, 2009).

deregulation has been a substantial spur to the increased deployment of broadband and advanced networks. And this investment coupled with increased broadband competition in all markets, including the small business market, has provided a wealth of product and service options for end users.

With any petition seeking reevaluation of existing Commission rules, particularly those promulgated a mere six years ago, the petitioner must demonstrate some changed circumstances that would warrant such a change. Otherwise, the Petition is merely an untimely petition for reconsideration.² Cbeyond claims that there has been “changed circumstances” but in essence their claim is that the changed circumstances have been a lack of change. Specifically, Cbeyond argues that the Commission’s major premise in not applying unbundling obligations to hybrid and fiber loops, *i.e.*, that such unbundling would serve as a disincentive to ILEC investment, appears to have been false.³ While this premise has no basis, Cbeyond nonetheless contends that the market it serves -- the market for businesses with 250 or fewer employees (which it refers to as the small business market) -- has been negatively impacted by this alleged lack of investment. According to Cbeyond, this has led to a network that is unable to meet small business service needs.

Cbeyond proposes that the Commission require ILECs to “provide unbundled access to the packetized bandwidth of hybrid loops, FTTH loops, and FTTC loops at retail rates”⁴ and that “incumbents 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

² 47 C.F.R. § 1.106(f).

³ Cbeyond Petition at 11.

⁴ *Id.* at 5.

the relevant MSA.”⁵ First, as described further below, there is no basis for the Commission to turn back the clock and require unbundling of fiber and hybrid loops under Section 251(c). Second, there is no basis for the Commission to set a price for these elements at what Cbeyond refers to as the “lowest retail rate.” While this would not be a rate equal to TELRIC, there is no question that, as described below, the rate will not compensate LECs for the significant cost of providing such access to CLECs, not to mention the fact that the rate would not reflect the costs of changes to the network architecture model that would be needed to provide unbundled access to the fiber facilities. Cbeyond’s proposed rate regulation of access to fiber and hybrid loops in and of itself is unwarranted and would discourage investment in broadband networks and advance services. Third, as discussed below, there is no basis to require ILECs to offer such a *new* “packetized bandwidth” service, which would impose significant implementation costs on ILECs.

As Qwest shall demonstrate, Cbeyond has provided this Commission with no justification to devote resources to embark on a reevaluation of these rules. The Commission’s rules, which have already been found to be in accord with the goals of the 1996 Act, have spurred broadband competition and investment which is exactly what the Commission predicted would occur.

II. THE COMMISSION’S RULES REGARDING FIBER AND HYBRID LOOPS HAVE PROMOTED COMPETITION AND INVESTMENT

A. The Commission’s Rules are in Accord with the Letter and Spirit of the Telecommunications Act of 1996.

The Commission rendered its decision to refrain from attaching unbundling obligations to ILECs’ next generation fiber networks in order to promote ILEC investment and to provide

⁵ *Id.* at 21.

incentives for CLECs to differentiate their product offerings by deploying their own facilities.⁶

In making this determination, the Commission was applying the type of “nuanced” analysis mandated by both the Supreme Court and D.C. Circuit.⁷ Cbeyond’s Petition asks the

Commission to do the very thing that the D.C. Circuit admonished it not to do in *USTA*.

Cbeyond’s Petition focuses on a discrete segment of the broadband market and ignores the overall competitive context of the market and ILECs’ place in that market. As the D.C. Circuit observed, the Commission’s Advanced Services reports confirmed “both the robust competition, and the dominance of cable, in the broadband market.”⁸ The court noted that the Commission had found that “Competitive LECs and cable companies appear to be leading the incumbent LECs in their deployment of advanced services.”⁹

⁶ *In the Matter of 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 Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-42 ¶ 272 (2003) (*Triennial Review Order*), corrected by Triennial Review Order Errata, 18 FCC Rcd 19020 (2003); on remand, 20 FCC Rcd 2533 (2005). The Commission determined:

First, 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. Thus, we conclude that relieving incumbent LECs from unbundling requirements for these networks will promote investment in, and deployment of, next-generation networks. Second, 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. The end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services.

⁷ *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389-390 (1999); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425-426 (D.C. Cir. 2002) (*USTA*).

⁸ *USTA*, 290 F.3d at 428-429.

⁹ *Id.*, quoting *Local Competition Order*, 15 FCC Rcd at 3835 ¶ 307.

The Commission was directed to look at the entire competitive context and not one particular technology. The court found nothing that provides a “license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition.”¹⁰ Cbeyond does not provide any indication that the “robust competition” in broadband in the mass market has in any sense diminished, or that cable has lost its competitive lead. And, with the cable industry’s penetration into the small business market, any onerous unbundling requirements imposed on ILEC fiber facilities will only exacerbate the competitive divide between cable companies and ILECs in the broadband market.

For some facilities, there is likely to be some type of cost disparity because the cost for a newer entrant will be higher than that of the incumbent. For instance, to duplicate a loop in an ILEC’s existing network may be more expensive for a CLEC than an ILEC. But to deploy a new loop, particularly a fiber loop that can support multiple services such as voice, data and video, does not create the cost disparity that duplication of an ILEC legacy loop may create, nor would such deployment be wasteful.¹¹ The Commission is tasked with applying a standard of impairment that does not mandate forced sharing in the face of every cost disparity.¹²

¹⁰ *Id.* at 429.

¹¹ *See, id.* at 427. As the D.C. Circuit observed:

Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities. *See Iowa Utilities Board*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part). At the same time -- the plus that the Commission focuses on single-mindedly -- a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful. 525 U.S. at 416-17. Justice Breyer concluded that fulfillment of the Act’s purposes therefore called for “balance” between these competing concerns. *Id.* at 429-30. A cost disparity approach that links “impairment” to universal characteristics, rather than ones linked (in some

The Commission determined that “the substantial revenue opportunities posed by FTTH deployment help ameliorate many of the entry barriers presented by the costs and scale economies.”¹³ Thus, the CLEC is in relatively the same position as the ILEC when it comes to deploying such loops, particularly in greenfield situations. In fact, at the time of the *Triennial Review Order*, CLECs were far ahead of the ILECs in FTTH deployment having deployed more than two-thirds of the existing FTTH loops.¹⁴ Unbundling, however, would have provided CLECs little incentive to invest, and would have dampened the ILEC incentive to invest. In the words of the D.C. Circuit in *USTA*, “[i]f 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.”¹⁵ Having a competitor deploy its own facilities also provides the seeds for product/service differentiation.¹⁶ As Justice Breyer emphasized in *Iowa Utilities Board*, “[i]t is in the unshared, not in the shared, portions of the enterprise that meaningful competition would

degree) to natural monopoly, can hardly be said to strike such a balance. The Local Competition Order reflects little Commission effort to pin “impairment” to cost differentials based on characteristics that would make genuinely competitive provision of an element’s function wasteful.

¹² The D.C. Circuit in *USTA* elaborated on the build/lease dichotomy at the center of the unbundling determination by noting that the key question is whether it would make economic sense for a competitor to duplicate an “essential facility.” *Id.* at 426. (“The doctrine’s basic idea is that where one firm controls some facility (such as a bridge) that is essential for competition in a broader market, and it would make *no economic sense* for competitors to duplicate the facility, and certain other criteria are satisfied, see generally Phillip E. Areeda & Herbert Hovenkamp, 3A Antitrust Law PP 771-73 (1996), the owner may be compelled to share the facility with its competitors.” (*Emphasis in original.*))

¹³ *Triennial Review Order*, 18 FCC Rcd at 17142-43 ¶ 274.

¹⁴ *Id.* at 17143 ¶ 275.

¹⁵ *USTA*, 290 F.3d at 425, *citing*, *Iowa Utilities Board*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part); cf. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 647-53, 88 L. Ed. 333, 64 S. Ct. 281 (1944) (Jackson, J., dissenting) (discussing supply implications of cost-based regulation of natural gas production).

¹⁶ *Triennial Review Order*, 18 FCC Rcd at 17141-42 ¶ 272.

likely emerge.”¹⁷ Since the fundamental goal of the Act is to create a pro-competitive deregulatory framework that would lead to the deployment of advanced telecommunications services, it made eminent sense for the Commission to refrain from applying onerous unbundling obligations on fiber and hybrid loops that CLECs were generally equally capable of providing and that could support the next generation of broadband services.

The Commission’s rules on fiber and hybrid loops were not a shot in the dark, but the product of its analysis of an extensive record that (1) demonstrated CLECs would not be impaired without access to such facilities and (2) deregulation of such facilities would spur competition and investment. The approach was by no means an “experiment” but a predictive judgment rooted in nuanced analysis, and the success of the approach has vindicated the Commission’s determination.

B. The Commission’s Predictive Judgment Has Been Borne Out.

Cbeyond contends that the Commission’s “experiment” in deregulation in the broadband market as a means of promoting deployment and adoption has been a failure in the small business market.¹⁸ Cbeyond bases its conclusion on its “experience” in the market that 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.”¹⁹ Qwest notes that Cbeyond appears to define the small business market it serves as including businesses with up to 250 employees -- which includes medium-sized businesses.²⁰ Cbeyond contends that these businesses are denied access to a sophisticated portfolio of business

¹⁷ *AT&T v. Iowa Utilities Board*, 525 U.S. 429 (Breyer, J., concurring in part and dissenting in part).

¹⁸ Cbeyond Petition at 12.

¹⁹ *Id.* at 16.

²⁰ *Id.*

applications at prices suitable for small and medium-sized businesses that take advantage of capacities above the T-1 level. As a result, from Cbeyond's vantage point, small and medium-sized businesses are "relegated to the limited capacity world of T-1 facilities." Cbeyond's portrayal of this market is not accurate.

First of all, Qwest and other providers already provide a host of services to small and medium-sized business customers, and new innovative services are being offered on a regular basis as technologies evolve. A small business customer would need to look no further than Qwest's web site to find a suite of services and products specifically designed for small businesses. Qwest has a full time sales and marketing team that is *focused exclusively on the small business market*, which in Qwest's experience, is subject to intense competition. On the Qwest web site,²¹ small business customers can find information about the following products:

Qwest Core Connect

Qwest® Core Connect™ delivers a single, reliable solution for voice and data connectivity that simply works. It is the perfect mix of business phone, high-speed Internet, business e-mail and website services essential for small business success. The customer receives the core features needed to run their business, with the help and support they expect from an innovative solutions provider like Qwest.

Qwest iQ Integrated Access

The Qwest iQ® Integrated Access Package integrates local and long-distance voice services with Internet access on the same reliable circuit. It works with the customer's existing equipment and uses Voice over Internet Protocol (VoIP) technology to dynamically allocate bandwidth between voice and data in real time. The customer receives high IP quality for up to 46 lines.

²¹ These products can be found on Qwest's website at:
<http://www.qwest.com/smallbusiness/products/index.html#CO>.

The product catalogs which include detailed product descriptions and pricing for these services can be found at: http://www.qwest.com/smallbusiness/bundled_services/.

Qwest Primary Rate Service (PRS) + iQ Data

The Qwest Primary Rate Service (PRS) + iQ Data® Bundle combines two powerful packages into an extremely flexible and highly customizable network solution for businesses of all sizes.

It offers everything necessary to link and streamline operations for multiple office locations, arming the customer with the tools to seamlessly share all types of information even from remote locations.

Qwest Primary Rate Service (PRS)

Qwest Primary Rate Service (PRS) is an all-in-one package with a strategic mix of advanced digital communication tools. It works with the customer's existing phone lines to give them powerful digital phone service that supports global connectivity and simultaneous Internet access, data file transfer, voice calls, fax transmission and video traffic at higher data speeds.

A scalable business-class networking solution, the Qwest iQ® Data Bundle provides the customer everything they need to tie together multiple office locations. It streamlines the customer's operations saving them time, so they can focus on their business goals.

Qwest iQ Managed VoIP Bundle

The Qwest iQ Managed VoIP Bundle meets all the customer's local, long distance and Internet needs in one powerful, integrated and managed communication platform.

In addition, Qwest offers many additional advanced products to larger businesses that would fit into Cbeyond's market of businesses with less than 250 employees. Cbeyond posits that given access to fiber and hybrid loops, it can develop a series of business applications for small businesses that heretofore have been limited to large businesses. According to Cbeyond, 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.²²

Qwest classifies these types of services as "highly customized technology services." The technologies required to offer such services have only been introduced to the market within the

²² Cbeyond Petition at 18.

past two years and are still being vetted out from a standards and technology perspective. Software as a Service (SaaS) and High-Definition Video Conference provide examples of applications where standards bodies are just now evolving. As a result, early adopters have been the large companies, and in some cases, medium-sized businesses, that can afford to invest in proprietary dedicated hardware and custom deployments. However, Qwest is actively striving to understand the technology evolution, adoption, scale and costs with the goal to enable these advanced services for all segments of the market. Qwest has already begun to deploy advanced multi-media messaging platforms, SaaS services and Data Protection services that are designed to be within the reach of small business budgets. The descriptions for certain Qwest conferencing and managed network services applications -- which are available today -- are attached as Exhibit A.

Cbeyond implies that the availability of these types of services to small and medium-sized business customers will only occur if Cbeyond is able to access fiber and hybrid loops on an unbundled basis. This is not the case. In reality, Qwest and many other providers are already moving to provide such services to medium and small businesses, and availability will expand rapidly without the unbundling of fiber and hybrid loops.

The product and service alternatives that small and medium-sized business customers demand are not limited to Cbeyond or Qwest. Cox, Comcast and other cable providers as well as many other CLECs are offering an increasing array of services to meet the demands of the small and medium-sized business market.

As a threshold matter, the idea that a secondary player in the broadband market, *i.e.*, ILECs, be subject to potentially destructive regulation based simply on the alleged marketing

preferences of the dominant player, *i.e.*, the cable companies is ludicrous. Nonetheless, Cbeyond discounts the significance of cable providers in the small business market, arguing that:

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.²³

As a threshold matter, the idea that a secondary player in the broadband market, *i.e.*, ILECs, be subject to potentially destructive regulation based simply on the alleged marketing preferences of the dominant player, *i.e.*, the cable companies is ludicrous.

This is simply not accurate, as the major cable companies in the Qwest region, including Comcast, Cox, Mediacom and Bresnan have all focused on providing communications services to the small- and medium-sized business market. For example, while Cox is a major competitor in the residential market, it also competes vigorously with Qwest in the business market, providing a broad range of business products to small, medium and large business customers throughout its serving area.²⁴ Cox offers voice telephone service, high-speed Internet, digital trunks, Centrex service, long distance and “toll free” services, private line service (DS1, DS3 and OC3 to OC192), transparent LAN service, virtual private network service and business video service.²⁵ In fact, Cox has established a separate marketing division, Cox Business Services, focused specifically on the small, medium and Enterprise business market segments.²⁶ Cox markets these services aggressively to small and medium business customers, as its “Cox Business” web site attests.

²³ *Id.* at 17.

²⁴ *See:* http://www.coxbusiness.com/systems/az_phoenix/index.html.

²⁵ *See:* <http://www.cox.com/arizona/business/services.asp>.

²⁶ *See:* <http://www.coxbusiness.com/index.html>.

Comcast also aggressively competes nationally in the small and medium-sized business market throughout its serving area, offering voice, Internet, Ethernet and TV services that are targeted to small and medium-sized business customers.²⁷ To illustrate how Comcast competes with ILECs such as Qwest in the small and medium-sized business market, attached as Exhibit B is a comparison of Comcast's "Business Class" services with similar services provided by Verizon, Qwest and AT&T. This comparison was downloaded from the Comcast web site.²⁸

In its 3Q09 earnings report, Comcast reiterated its commitment to the small and medium-sized business market. In fact, Comcast announced that, for small businesses with less than 20 employees, its goal is to "capture 20-25% of the \$12-\$15 billion market opportunity."²⁹ Comcast also re-stated its commitment to expanding its presence in "medium-sized . . . businesses with 20-250 employees," which it sees as a "\$10-\$15 billion market opportunity."³⁰ Comcast has reported steadily increasing business services revenues, which increased from \$394 million in 2007 to \$558 million in 2008. For the first nine months of 2009, revenues have shown robust growth in each quarter -- with revenues of \$590 million for just nine months.³¹ See Exhibit C. In addition, Comcast recently filed a petition with the Commission regarding its proposed acquisition of Cimco, a CLEC that caters almost exclusively to the small- and medium-size business market.³²

²⁷ <http://www.comcast.com/corporate/Learn/Business/business.html?fss=business%20products>.

²⁸ See: <http://business.comcast.com/comparison/compare.aspx>.

²⁹ See: <http://files.shareholder.com/downloads/CMCSA/789830167x0x329413/dad4c696-0929-49e3-ad34-2ab8e8d05ff0/ComcastQ3Slides.pdf>.

³⁰ *Id.*

³¹ *Id.*

³² See *Application Filed for the Acquisition of Certain Assets and Authorizations of Cimco Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, filed Oct. 7, 2009 and Public Notice, WC Docket No. 09-183, FCC 09-104, rel. Dec. 1, 2009.

Cbeyond argues that cable companies are ill-suited to be real competitors for small and medium-sized business, and alleges that they are not likely to offer the advanced services that these customers demand. There is certainly no evidence that this is the case, as Cox, Comcast and other cable providers have made a significant commitment to the small business market. They will continue to expand their offerings to provide the latest technologies, just like ILECs and CLECs will. It is folly to think that these large and well-capitalized companies will simply cede the market for advanced business services, and that only Cbeyond will be able to provide the advanced services these customers need.

It is significant that cable companies have been significantly expanding their broadband reach, and pouring billions of dollars into upgrading their networks. For example, cable companies have been investing in upgrading their networks to the DOCSIS 3.0 standard, which allows far greater broadband speeds. According to the *Broadband in America Report*, “Cable broadband upgraded to DOCSIS 3.0 is becoming widely available today at advertised speeds as high as 50 megabits downstream (with one firm advertising 101 megabit speeds)” and 20 mbps upstream.³³ Comcast has been particularly aggressive in adding DOCSIS 3.0 capability to its network. According to Stephen Burke, Comcast’s Chief Operating Officer:

DOCSIS 3.0 allows you for the first time to really dramatically increase your capacity for high-speed. . . DOCSIS 3.0 allows you to do something called channel bonding, which means putting together channels so you can really get data speeds that are 100 meg if you want.

And so we decided to try to get 80% of the company DOCSIS 3.0 compliant as quickly as possible by the end of this year and we’ve done that, and again when you’re competing with DSL, which is all our competition in 75% of the country, and they struggle to get five meg and you can offer 50, 75 or 100 and you have all these services doing very, very high-quality video or high-quality gaming or

³³ *Broadband in America Report*, Where It Is and Where It Is Going; Preliminary Report Prepared for the Staff of the FCC’s Omnibus Broadband Initiative, by Robert C. Atkinson & Ivy E. Schultz, dated Nov. 11, 2009 at 21 and 33.

everything else, I think those kinds of investments are what's going to really power the next generation of growth on the DOCSIS side.³⁴

There are also numerous other CLECs that serve Cbeyond's target market -- the market for businesses with less than 250 employees. In the Qwest region, these CLECs include tw telecom, Integra, PAETEC/McLeod, XO and many others. These CLECs compete with Qwest, Cbeyond, cable companies and other CLECs to meet the evolving needs of small and medium-sized businesses. While Cbeyond seeks to portray itself as the one CLEC that can serve these customers' growing and evolving needs -- if only it has access to fiber and hybrid loops -- the fact is, many CLECs are focused on meeting the needs of these customers, and they are doing so today without access to unbundled fiber and hybrid loops. For example, consider two of the major CLECs active in the Qwest region who are focusing on the business market: tw telecom and Integra:

- tw telecom is a facilities-based CLEC operating in 75 markets encompassing 30 states.³⁵ tw telecom focuses on the small, medium and Enterprise business markets, and offers a wide range of telecommunications services including business voice service, dedicated high capacity services, digital trunks, ISDN, long distance, dedicated Internet access, LAN services and MPLS IP VPN service. In February 2009 tw telecom announced: "tw telecom, a leading provider of managed voice, Internet and data networking solutions for businesses, today introduced a managed customer edge router solution to compliment its existing MPLS IP VPN network capabilities."³⁶ tw telecom states on its website, "We're one of the top three business Ethernet service providers nationwide."³⁷ With regards to small business, tw telecom notes that "From local phone service to bundled packages of voice and data services, tw

³⁴ Comcast Comments at Bank of America-Merrill Lynch Conference, September 9, 2009. *See* http://files.shareholder.com/downloads/CMCSA/789830167x0x321428/bb736678-a561-44d5-bece-b201ec4e3cd3/CMCSA-Sep_9_2009.pdf.

³⁵ *See*: http://www.twtelecom.com/about_us/networks.html, visited 5-15-09.

³⁶ tw telecom Press Release, *see*: http://www.twtelecom.com/Documents/Announcements/News/2009/Managed_Services_FINAL.pdf.

³⁷ *See*: http://www.twtelecom.com/about_us/networks.html.

telecom delivers the solutions that meet the needs of small and growing businesses,” including Co-location, Native LAN, Storage Transport, Switched Native LAN, dedicated high-capacity services, voice and various bundles.³⁸

- Integra -- a major player in several Qwest markets -- is a facilities-based CLEC providing a range of services to small, medium and Enterprise business customers, including traditional voice services, DSL, broadband Internet, high bandwidth data, email and web-hosting, online data storage, integrated T-1, VPN and network solutions, metro area network and many other services.³⁹ In describing its “milestones” for 2009, Integra states: “Integra launches new Broadband Internet service that offers small and medium-sized businesses enterprise-level Internet access at rates that fit the small- and medium-sized business budget. The new service combines the bandwidth potential of Integra’s metropolitan fiber networks with two phone-grade copper lines to deliver download speeds of 5, 15 and 25 Mbps and upload speeds of up to 2 Mbps within most of the markets Integra serves.”⁴⁰

C. There Has Been Substantial ILEC Fiber Investment in the Post-Triennial Review Order Years.

There is no basis for Cbeyond’s claims that the *Triennial Review Order* did not incent ILECs to invest in broadband and other technologies. In reality, ILECs have invested heavily in the provision of broadband services such as DSL, FTTN and FTTH since the Commission’s non-impairment finding in 2003. According to the Commission’s latest “High-Speed Services for Internet Access” report (showing data as of June 30, 2008), the total number of high-speed lines in service across all modalities has grown dramatically in the United States -- from 23.0 million lines in June 2003 to 132.8 million lines in June 2008, an increase of over 470% in five years.⁴¹ While wireless broadband has exploded over 14,000% in five years, the type of wireline

³⁸ See: http://www.twtelecom.com/cust_solutions/sm_med_biz_sol.html.

³⁹ See: <http://www.integratelecom.com/services/>.

⁴⁰ See: http://www.integratelecom.com/about/company_milestones.php.

⁴¹ *High-Speed Services for Internet Access: Status as of June 30, 2008*, Industry Analysis and Technology Division, Wireline Competition Bureau, rel. July 2009, Table 1 (FCC Broadband Report).

broadband typically provided by ILECs -- primarily DSL and fiber -- has also increased dramatically. For example, ADSL lines increased from 11.4 million in June 2003 to 29.96 million in June 2008, an increase of 162%, and fiber broadband lines increased from 0.13 million to 2.3 million, an increase of over 1700%. Significantly, since 2003, DSL and fiber broadband lines have increased far more rapidly than cable modem lines, which increased from 18.6 million to 38.19 million -- or 105%. Thus, since the Commission's *Triennial Review Order* decision, DSL and fiber have gained ground on cable modem service.

ILECs have also reported significant increases in the number of DSL broadband lines since June 2008 -- the date of the FCC report cited above. For example, Qwest reported an increase in mass market broadband subscribers from 0.64 million in 2003 to 2.95 million in September 2009.⁴² Verizon reported that, as of the third quarter of 2009, it now serves 9.174 million broadband customers, including 3.28 million FiOS FTTH high-speed Internet customers.⁴³ Verizon's overall broadband lines have increased over 30% since December 2006 and its FiOS lines have increased almost 50% in the last year alone.⁴⁴ AT&T reported 15.6 million broadband lines as of the third quarter of 2009, up from 14.1 million as of the end of 2007.⁴⁵ These results hardly support the contention that the Commission's *Triennial Review Order* decision (and its 2003 *Line Sharing* order) did not incent broadband investment. In fact, a recent study found that broadband growth appears to be negatively correlated with regulation:

⁴² Qwest 3Q09 Earnings Release. See: <http://investor.qwest.com/earningsarchive>.

⁴³ *Id.* See also: http://investor.verizon.com/financial/quarterly/vz/3Q2009/supplemental_schedule_3Q09.xls?t=633956169991380665 and <http://investor.verizon.com/news/20091026/20091026.pdf?t=633956176381849415>.

⁴⁴ See: http://investor.verizon.com/financial/quarterly/vz/3Q2009/supplemental_schedule_3Q09.xls?t=633956169991380665.

⁴⁵ See: http://www.att.com/Investor/Growth_Profile/download/master_Q3_09.xls.

Prior to 1Q2003, cable modem service was unregulated (and has remained so), while digital subscriber lines (DSL) were subject to network unbundling mandates. Those rules were effectively lifted in 1Q2003 and 3Q2005. Across regimes, subscriber growth appears significantly and negatively correlated with regulation. By year-end 2006, DSL subscribership was about 65% above the trend established in the regulated pre-1Q2003 era, a difference of eight to ten million households.⁴⁶

This robust deployment response is inconsistent with the view that broadband regulation promotes innovation that spurs infrastructure investment or deployment.⁴⁷

In seeking to advance its unsupported assertion that the Commission's 2003 *Triennial Review Order* did not incent ILEC's to invest in broadband networks, Cbeyond cites, as its "evidence," a study performed by Economics and Technology, Inc. (ETI) which purports to show that "incumbent LEC network investment 'decreased sharply' after 2001, when the FCC began pursuing its deregulatory agenda."⁴⁸ Essentially, the ETI Study observes that ILEC capital expenditures were high in the "regulation" era from 1996 through 2001, and then declined significantly in the so-called "deregulation" era of 2002 to 2007.⁴⁹ According to Cbeyond, this investment decline "proves" that the Commission's actions did not stimulate ILEC investments in broadband and other advanced services, and that the Commission's "predictive judgment" is false.

ETI's claim strains credulity. Even a cursory view of what has happened in the industry over the past 15 years reveals the extreme flaws in Cbeyond/ETI's logic and conclusions. The ETI Study correctly notes that capital outlays by Qwest and other RBOCs in general declined significantly after 2001, and remained lower for the next several years. However, the major

⁴⁶ Hazlett, Thomas, *Natural Experiments in U. S. Broadband Regulation*, Review of Network Economics, Vol. 7, Issue 4, December 2008 at 460.

⁴⁷ *Id.* at 477.

⁴⁸ Cbeyond Petition at 15.

⁴⁹ 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 23 (Attachment B to Cbeyond Petition).

factor behind this decline had little to do with “deregulatory” decisions by the Commission. It is no secret that capital investment outlays by ILECs -- and by most other technology companies -- were in hyper-drive in the late 1990s and into 2001. During this timeframe, Qwest (and the former U S WEST) was investing heavily in building a new fiber network. In addition, Qwest and other ILECs were investing heavily to meet the requirements of the Telecommunications Act of 1996 (*e.g.*, developing the Operating Support Systems needed to provide Unbundled Network Elements and Interconnection). Qwest reported 8.99 billion in capital expenditures in 2000 and \$8.54 billion in capital expenditures in 2001.⁵⁰

The high level of investment by Qwest and other ILECs coincided with the infamous “technology bubble” that burst in the 2000-2001 timeframe. After the technology bubble burst, Qwest’s capital expenditures declined rapidly, just like the capital expenditures of many other technology companies. During 2002, Qwest’s capital expenditures were reduced to \$2.8 billion for the year. Overall capital expenditures fell further to \$2.09 billion in 2003 and \$1.73 billion in 2004.

Incredibly, the ETI Study *does not even mention* the technology bubble or the general economic situation that existed after 2001 as a possible factor in the reduced investment expenditures. Instead, Cbeyond, with its ETI Study, attempts to tie the reduced capital expenditures in the time period following the bursting of the technology bubble to the Commission’s regulatory actions. In retrospect, it is clear that capital expenditures across the industry may have been too high in the late 1990s into 2001, and there is no way that these levels could be maintained on a going-forward basis, regardless of any Commission regulatory actions. It is disingenuous to argue that reduced *total* capital expenditures in the post-2001 era prove that

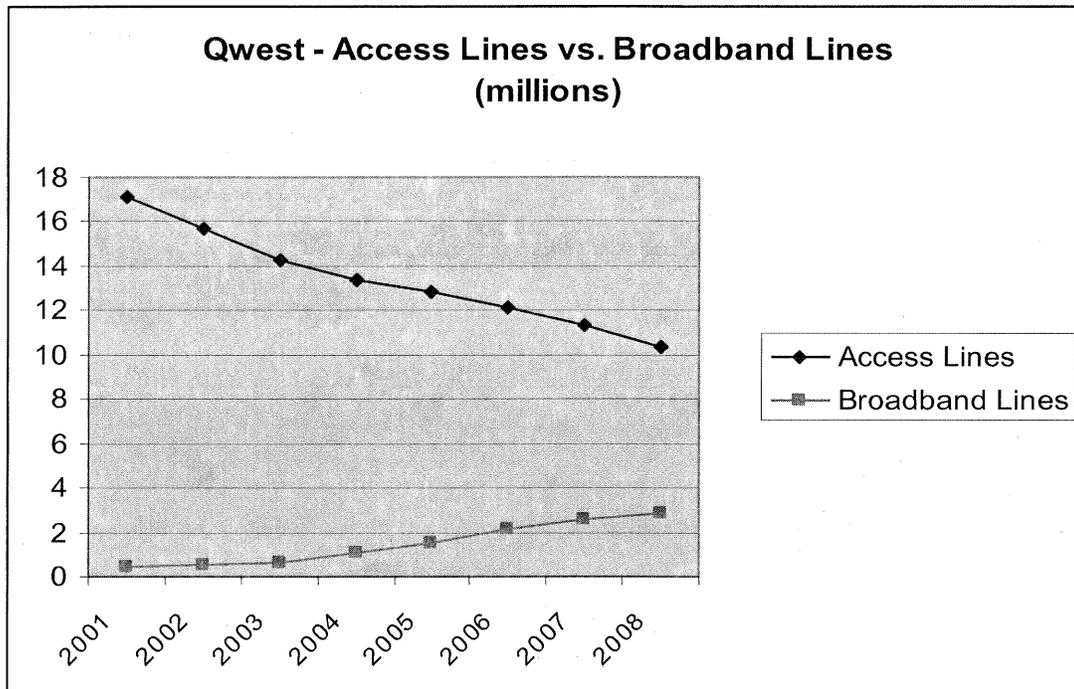
⁵⁰ See: <http://investor.qwest.com/earningsarchive>.

the Commission's non-impairment decision -- which occurred in 2003 -- has somehow failed to stimulate broadband investment.

Cbeyond concludes that because (1) *total* capital expenditures by ILECs after 2001 were lower than total capital expenditures before 2002, and (2) subsequent *total* capital expenditure levels have increased only slightly, there is no evidence that ILEC's have been incented to invest in broadband. Cbeyond states that "from an already reduced level, incumbent LEC investment held fairly constant and rose slightly. . . contrary to the expectations of the FCC when it issued the *Triennial Review Order* and related decisions."⁵¹ However, the level of *total* capital expenditures for Qwest and other ILECs is not an indicator of *broadband* or advanced services investment. It is true that Qwest's total annual capital expenditures have remained relatively constant since 2004, ranging from between \$1.6 and \$1.8 billion per year.⁵² However, these relatively constant *total* capital expenditure numbers mask the underlying investment trend. Since the turn of the century, Qwest and other ILECs have been experiencing steady losses in traditional wireline services (switched access lines) coupled with growth in broadband services. A comparison of Qwest access lines versus broadband subscribers since 2001 is instructive:

⁵¹ Cbeyond Petition at 15-16.

⁵² See: <http://investor.qwest.com/earningsarchive>.



While traditional access lines have decreased almost 40% since 2001, broadband lines (e.g., DSL) have increased over 500% in the same time period. As Qwest traditional access lines have declined, there is a decreasing need to make capital expenditures to grow the traditional circuit switched network. At the same time, there is an increasing need to spend capital dollars on the expanding broadband network. Thus, while *total* capital expenditures have remained relatively constant, the mix of these expenditures has shifted in the past several years.

Qwest has been investing heavily over the past several years in its broadband network. In just the last year:

- Qwest has invested significant sums to increase its broadband capability through its FTTN initiative. On July 20, 2009 Qwest introduced the next evolution of its high-speed Internet services, delivering downstream connection speeds of 40 Mbps and upstream speeds of 20 Mbps. “Using next-generation VDSL2 broadband technology, Qwest doubles its fastest downstream connection speeds and increases upstream speeds -- among the fastest available in the country -- for qualifying residential and small-business customers.”⁵³ This VDSL technology expands on Qwest’s FTTN

⁵³ Press Release, July 20, 2009, see: <http://news.qwest.com/VDSL2>.

deployment, which has reached more than 2 million potential customers in its local service region. According to Qwest's 3Q09 Earnings Announcement, "Qwest continued to make strong progress on expanding broadband capabilities in the third quarter. Fiber to the node (FTTN) was deployed to more than 500,000 additional homes during the quarter. Qwest's FTTN footprint now reaches more than three million homes. In the quarter, 71,000 customers added broadband services that utilize the fiber network."⁵⁴

- On September 2, 2009 Qwest announced that it was enhancing its nationwide network with breakthrough technology that will position Qwest to deliver speeds of up to 100 Gigabits per second (Gbps) to its customer edge sites. This build-out has begun on Qwest's network and is planned through 2010.⁵⁵
 - Qwest's objective with this network upgrade is to deliver more powerful capabilities to its customer base, including global enterprises and governments.
 - Additionally, this upgrade directly addresses and alleviates pressure on the network backbone. Internet traffic is doubling approximately every 19 months. And each year, individual Internet users consume approximately 43 percent more bandwidth than the previous year.⁵⁶
- On October 15, 2008 Qwest announced a significant expansion of its global Ethernet services portfolio. The services enable business customers in more markets to scale their bandwidth needs and use the flexibility of Ethernet to transmit data between multiple locations. Qwest rolled out Ethernet service in 759 new cities, bringing its total number of U.S. cities served to 1,129.⁵⁷
- On December 16, 2009 Qwest began expanding its Ethernet portfolio with a new 3-, 5-, 7-Mbps metro optical Ethernet solution. Qwest is introducing the service in Phoenix, Tucson, Flagstaff, Yuma, and Omaha with plans to expand to other markets within the Qwest 14-state region. This new service is ideal for businesses, organizations and agencies interested in a competitively priced, secure local area network (LAN) for data transmission.

Other ILECs have also been investing heavily in deploying broadband networks.

Verizon has spent billions over the past few years to deploy its FTTH network. As of 3Q09, 3.28 million of Verizon's 9.174 million broadband customers are now FiOS FTTH high-speed

⁵⁴ Press Release, Qwest 3Q09 Earnings Report, October 28, 2009. *See:* <http://investor.qwest.com/earningsarchive>.

⁵⁵ <http://news.qwest.com/QwestNetworkEnhancements>.

⁵⁶ *Id.*

⁵⁷ <http://news.qwest.com/index.php?s=43&item=80>.

Internet customers.⁵⁸ Verizon's overall broadband lines have increased over 30% since December 2006 and FiOS lines have increased from 2.48 million in 3Q08, an increase of almost 50% in one year.⁵⁹ According to its 3Q09 investor presentation, FTTH is now available to 14.5 million homes and the penetration rate for Internet broadband services is now 29%.⁶⁰ Verizon hopes to have its FTTH build-out complete in 2010. In addition, AT&T reported 15.6 million broadband lines as of the third quarter of 2009, up from 14.1 million as of the end of 2007.⁶¹

D. Re-imposing Unbundling Requirements for Fiber and Hybrid Loops Would Discourage Future Investment, Reducing Consumer Welfare.

Cbeyond and ETI argue that:

[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*.⁶²

Thus, Cbeyond and ETI casually discount the risks taken by ILECs in building broadband networks. There is no basis for this unsupported opinion. Verizon, for example, took on significant risks in building its FTTH network -- risks that it deemed prudent based on projections that it would be able to recoup its significant investments from customers over time. However, no rational company would expend such a high level of capital expenditures if it knew

⁵⁸ *Id. See also*

http://investor.verizon.com/financial/quarterly/vz/3Q2009/supplemental_schedule_3Q09.xls?t=633956169991380665 and

<http://investor.verizon.com/news/20091026/20091026.pdf?t=633956176381849415>.

⁵⁹ *See*

http://investor.verizon.com/financial/quarterly/vz/3Q2009/supplemental_schedule_3Q09.xls?t=633956169991380665.

⁶⁰ *See* <http://investor.verizon.com/news/20091026/20091026.pdf?t=633956176381849415>.

⁶¹ *See* http://www.att.com/Investor/Growth_Profile/download/master_Q3_09.xls.

⁶² Cbeyond Petition at 16.

it would have to turn around and provide access to its network to its competitors, which would significantly increase the risk that the capital expenditures would never be recovered. Yet Cbeyond would have the Commission require Verizon -- after risking its own capital to build its fiber network -- to be required to provide it on an unbundled basis to competitors. The simple fact is the Commission's 2003 decision encouraged Verizon to take this risk to build its FTTH network -- just the type of behavior the Commission sought to encourage -- under the assumption that it would at least have the opportunity to recoup investment from future customers. Now Cbeyond would like, after the fact, to change the rules so it can avail itself of this network without taking any of the risks that were incurred by Verizon.

Of course the same argument applies to the investments made by Qwest, AT&T and other ILECs. Encouraged by the Commission's fiber and hybrid loop non-impairment determination, Qwest has undertaken its FTTN and other capital expenditures with the understanding that it will have the opportunity to recover those investments. Qwest has risked its scarce capital to build this network, and now Cbeyond would like to gain unbundled access to this hybrid network -- again at no risk to Cbeyond.

Recent research demonstrates unequivocally that broadband providers are not currently exercising market power, and that imposing additional unbundling could have very adverse impact on ILECs.⁶³ Dr. Thomas Hazlett and Dr. Dennis Weisman recently performed an analysis of "q ratios" for both cable and telco broadband providers. A q ratio is equal to the firm market value divided by the replacement cost of tangible capital.⁶⁴ A q ratio above 1.0 "captures the

⁶³ *Market Power In U.S. Broadband Services*, Thomas W. Hazlett and Dennis L. Weisman, George Mason University Law and Economics Research Paper Series, 09-69, December 2009. See pages 25-30, which show that even at optimistic take rates, Verizon will be challenged to recover its FiOS investments.

⁶⁴ *Id.* at 10.

expectation of investors that the future flow of profits will be substantially in excess of costs, suggesting that supra-competitive profits are likely.”⁶⁵ Thus, a q ratio above 1.0 may be suggestive of market power, and a q ratio below 1.0 suggests that a provider is not exercising market power. Drs. Hazlett and Weisman found that the q ratios for Verizon, AT&T and Qwest are less than 1.0, with an average of 0.60, suggesting that these companies do not possess market power.⁶⁶ Drs. Hazlett and Weisman also note that “[i]nvestors see the telephone business (and its broadband and video products) as requiring heavy, ongoing capital outlays not justified by future cash flows.”⁶⁷ Drs. Hazlett and Weisman conclude:

We find no credible basis to believe that broadband providers, despite their relatively few numbers, are currently exercising market power. This is clear from focusing on the key metrics of profitability and market value, as opposed to the more arbitrary and less dynamically relevant measures of market share or operating margin. The absence of market power, as measured by q ratios that are consistently less than one, is a two-edged sword. From a static efficiency (market power) perspective, it may well suggest that there is ***no credible basis for government intervention in the form of price regulation or more intrusive unbundling obligations.*** From a dynamic efficiency (investment) perspective, the concern would be that investors are not particularly bullish on this sector and hence the prospects for continued, robust investment are not particularly promising. This begs the question of what role, if any, the government can be expected to play in stimulating investment in a sector it deems critical for economic growth and international competitiveness.⁶⁸ (Emphasis added.)

Cbeyond claims that unbundling of fiber and hybrid loops will help small business and will “spur job creation and a virtuous cycle of investment and innovation, all without any government spending.” It continues that “these benefits would come with relatively few costs to consumer welfare.”⁶⁹ In other words, now that ILECs have taken risks and invested capital to

⁶⁵ *Id.*

⁶⁶ *Id.* at 25.

⁶⁷ *Id.* at 24.

⁶⁸ *Id.* at 32.

⁶⁹ Cbeyond Petition at 21.

deploy advanced broadband networks, Cbeyond would like a risk-free invitation to the party. Of course this does not require “government spending” as the ILECs have already risked significant capital. If the Commission were to accept Cbeyond’s plea, it would have a chilling impact on future investment, and in fact would end the “virtuous cycle of investment and innovation,” not encourage it. Certainly if the Commission were to accept Cbeyond’s proposal, ILECs would have less incentive to invest in new and innovative technologies in the future, and would face a higher risk that their existing investments -- made under a different regulatory regime -- would not be recovered. In addition, there would be less incentive for CLECs such as Cbeyond to invest in broadband and other advanced services. Why would Cbeyond invest in its own facilities if it can simply buy the ILEC network risk free? The bottom line is that Cbeyond and other CLEC customers might benefit in the short run from forced unbundling, but in the long run, these customers would be worse off as investment and innovation is curtailed.

E. CLECs are Not Impaired Without Access to Unbundled Fiber and Hybrid Loops.

Cbeyond proposes that the Commission require incumbent LECs to “provide unbundled access to the packetized bandwidth of hybrid loops, FTTH loops, and FTTC loops at retail rates”⁷⁰ and that “incumbents 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.”⁷¹ The Commission must reject this proposal.

First, there is no basis for the Commission to turn back the clock and require unbundling of fiber and hybrid loops under Section 251(c), or to impose a “new” UNE loop with a bandwidth between DS1 and DS3. Cbeyond states that: “It is clear that competitors seeking to

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 21.

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.”⁷² Essentially, Cbeyond would like to have the Commission require ILECs to provide a “new” UNE, with a capacity of 6 to 10 Mbps, in addition to DS1 (1.544 Mbps) and DS3 (44.736 Mbps) loops, which are available at UNE rates in nearly all areas.⁷³ Cbeyond argues that it would like to provide new applications, but that it “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.”⁷⁴ The fact is, however, that Cbeyond can meet its needs for bandwidth between 1.5 and 45 Mbps by purchasing multiple DS1s or a DS3, and is not impaired without access to fiber and hybrid loops.⁷⁵

Cbeyond has been purchasing DS1 and DS3 facilities from ILECs for years, and has gained a significant share of the business market where it operates based on the purchase of these UNEs. According to Cbeyond’s latest annual report:

We lease T- 1 circuits primarily from the local telephone companies on a wholesale basis using unbundled network element, or UNE, loops or enhanced extended links, or EELs. An EEL consists of a T-1 loop combined with the interoffice transport facility. This design allows us to obtain the functionality of a T-1 loop without the need for collocation in the local telephone company’s serving office. We are able to take advantage of T-1 UNE loop and UNE EELs and the associated cost-based pricing of each because we meet certain qualifying criteria established by the Federal Communications Commission, or the FCC, for use of these services and because we have built the processes and systems to take advantage of these wholesale circuits, in contrast to many competitive carriers, which lease T-1 circuits under special access, or retail, pricing. As a result of regulatory changes adopted via the FCC’s Triennial Review Remand Order, or

⁷² *Id.* at 14.

⁷³ DS1 and/or DS3 loops may not be available in limited locations where, per the *Triennial Review Remand Order*, a wire center has been determined to be “non-impaired.”

⁷⁴ Cbeyond Petition at 18.

⁷⁵ Furthermore, the UNE to which Cbeyond is seeking access is not a network element in an ILEC’s network. Cbeyond is asking that a new network element be crafted.

TRRO, we are required to lease T-1 circuits under special access pricing when serving customers in certain geographical areas within the cities we serve. See “Government Regulation.”

We employ these wholesale T-1 circuits as follows:

- *UNE loops.* A UNE loop is the facility that extends from the customer’s premises to our equipment collocated in the local exchange company end-office that serves that customer location. We employ UNE loops when we have a collocation in the central office that serves a customer. We use high-capacity T-1 unbundled loops to serve our customers.
- *EELs.* An EEL is a combination of an unbundled T-1 loop and an associated T-1 transport element that are joined together by the local telephone company at the end-office serving the customer location. This allows us to obtain access to customer premises without having a collocation at the serving central office. The current FCC rules require local telephone companies to provide T-1 EELs to carriers subject to certain local use criteria, which we meet. Once we achieve sufficient density from a remote office, we deploy a dedicated DS-3 transport and regroom the T-1 transport elements onto the DS-3 transport circuit and remove the T-1 transport elements.⁷⁶

While Cbeyond claims it is impaired without access to unbundled fiber and/or hybrid loops, it is hard to reconcile this with the success of Cbeyond’s business plan during a time period when such UNEs were not available. Even as the U.S. has experienced economic difficulties, and even as Qwest’s revenues have remained flat, Cbeyond has expanded rapidly, with revenues increasing from \$113 million in 2004 to \$346 million in 2008.⁷⁷ Cbeyond revenues were \$196 million in the first six months of 2009 alone.⁷⁸ All of this has been achieved while relying on DS1 and DS3 unbundled network elements, and without access to ILEC fiber and hybrid loops. Cbeyond cannot now credibly claim that it is impaired without access to these fiber and/or hybrid loops.

⁷⁶ Cbeyond 2008 Form 10K, *see*: <http://ir.cbeyond.net/secfiling.cfm?filingID=1193125-09-47628>.

⁷⁷ *Id.*

⁷⁸ Cbeyond Form 10Q, June 2009, *see*: <http://ir.cbeyond.net/secfiling.cfm?filingID=1193125-09-167610>.

Cbeyond has not demonstrated that CLECs are impaired without access to these facilities. A requesting carrier's ability to provide service is "impaired" if, "taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic."⁷⁹ Not only has Cbeyond failed to demonstrate how it meets the impairment standard, but the factors to be considered in determining impairment, as we have demonstrated, indicate that there is no impairment regarding access to fiber and hybrid loops. Cbeyond glosses over the cable market's presence in the small business market, and has not demonstrated that this is not a viable alternative for CLECs. In fact, Granite Telecom has entered into a partnership with ABI, a private network service provider, which has relationships with nearly 200 cable suppliers. Granite states that this partnership provides:

them a national cable footprint where they provide virtual private networks (VPN) and high speed data circuits utilizing the Hybrid Fiber Coax infrastructure of their cable partners. ABI's wide scope of cable relationships will act as a supplier to strengthen Granite's service offerings to their regional and national clients.⁸⁰

This partnership should put an end to questions of cable providers not being an alternative source outside of the ILECs' networks.

Cbeyond also does not address the Commission's finding in the *Triennial Review Order* that the entry barriers for CLECs in greenfield or brownfield deployment are much lower and on a par with entry barriers ILECs face. Cbeyond also does not address how its purported suite of additional services that allegedly require unbundled fiber loops renders self-provisioning or

⁷⁹ 47 C.F.R. § 51.317.

⁸⁰ <http://www.granitenet.com/PressRoom/Pages/Articles/ABIFinalRelease.pdf>.

leasing from a third-party of fiber an uneconomic option. Cbeyond's failure to demonstrate that it meets the requirements of Rule 51.317(b) should, in and of itself, end the inquiry on Cbeyond's request.

Cbeyond can also not claim that the Commission's non-impairment decision in 2003 has discouraged its capital expenditures. Since 2004, Cbeyond capital expenditures have grown rapidly, increasing each year from \$23.74 in 2004 to \$69.94 million in 2008.⁸¹

Second, while there is no basis for the unbundling of fiber and hybrid loops at all, there is certainly no basis for the Commission to set a price for these "new" elements at the "lowest retail rate."⁸² In essence, Cbeyond asks the Commission to require unbundling per Section 251(c), but then set a rate not based on TELRIC, but based on the lowest rates an ILEC charges its retail customers for the service (*e.g.*, a 10 Mbps high-speed Internet connection). Cbeyond argues that this rate, which would be higher than TELRIC, would allow ILECs to earn a profit on the service. Cbeyond misses the point. There is no basis to require ILECs to provide fiber and hybrid loops to CLECs at *any* price, since CLECs are not impaired without access to these elements. Further, as described above, forcing ILECs to offer its broadband network on an unbundled basis to competitors would discourage investment and innovation, as the Commission found in the *Triennial Review Order*.

Third, as described below, requiring incumbent LECs to offer such a new "packetized bandwidth" service to CLECs would require significant and expensive changes to the network architecture. There is no basis to impose such costs on ILECs. And, in fact, it is the

⁸¹ Cbeyond 2008 Form 10K, *see*: <http://ir.cbeyond.net/secfiling.cfm?filingID=1193125-09-47628>.

⁸² In setting a rate the Commission must have evidence that the rate is reasonable (and that the existing rate is unreasonable). Cbeyond presents no such evidence or basis upon which such evidence might be obtained and analyzed.

significantly different network architecture needed to provide such unbundled access that would eviscerate any link between an ILEC's "lowest retail rate" and the rate needed for an ILEC to recover the cost of not only providing such a service but the cost of modifying its network to provide such a service. The lowest retail rate for a retail high-speed Internet service would be based upon an end-to-end Ethernet transmission path not a path that would require routing via a central office and the equipment necessary for a CLEC to be able to access the fiber or hybrid loop at that point. The retail rate for Qwest's High-Speed Internet product is not related to a rate for unbundled access to fiber and loops because the services are inherently different and are based on different network architecture. In addition, the prices for High-Speed Internet services also reflect the market forces where each product is offered.

F. The Costs of Providing the Access Cbeyond Seeks Far Outweigh the Benefits.

Cbeyond argues that the benefits of unbundling obligations outweigh the costs, but its cost benefit analysis is inverted. Allowing CLECs access to an ILEC's Ethernet network at the 6-10 mbps service level, as sought by Cbeyond, would lead to increased equipment and operations costs. Qwest did not develop its Ethernet network architecture to allow for third party facility access because it had no reason to expect that such access would be mandated. Such access would require routing via Qwest's legacy Time Division Multiplexing (TDM) network to enable CLEC access to the fiber facility at a central office, and this would not be efficient as compared to aggregating the traffic from various Ethernet switches to be transmitted to the IP-cloud. To tap the full efficiencies of an all Ethernet network and therefore provide the service at the lowest cost to its end-user customers, Qwest would bypass its legacy network entirely.

To provide for the service Cbeyond seeks, Qwest would have to re-engineer the network to provide for interfaces at each central office in which a CLEC seeks access to the fiber loops. To accommodate these interfaces, Qwest would need to install Gateways in each of the central

offices to enable CLEC access to the fiber facility serving the end-user customer. The Ethernet network is designed and engineered for access to only one carrier. Qwest would need to re-engineer its Ethernet switches to add low-level traffic ports to facilitate interconnection. For instance, Qwest has designed its Ethernet switches with ports designed for high-levels of aggregated traffic. Ports would need to be created on Qwest's Ethernet switches to allow the CLEC to access the fiber loop serving its end-user customer which would involve a much lower level of traffic.

The function of the Gateway is to provide Protocol Conversion, *i.e.*, to transform the Ethernet network (IP) to a TDM network. To provide the access Cbeyond seeks, an ILEC would need to outfit a central office with the Gateway and other necessary equipment to facilitate the Protocol Conversion. Furthermore, since Qwest would be increasing the number of ports in these switches, this would lead to added failure points in the Ethernet network and the increased costs of addressing those failure points. Thus, the Protocol Conversion needed to facilitate the unbundled access significantly diminishes the efficiencies inherent in the all-Ethernet network.

Allowing access by CLECs to the IP interface would also raise additional technical and operational issues. Network Management and Operational Support Systems (OSS) would also need to be developed to allow for these unbundling requirements, since current OSS deployment does not allow for segregation of data between multiple carriers. New Ordering and Maintenance interfaces would need to be developed to all multiple carrier access. These new interfaces are very time and resource-intensive. In sum, implementation of the Cbeyond Petition would increase ILECs' costs, and could provide upward pressure on rates (including the "lowest offered rate") charged to end users.

III. CONCLUSION

For the foregoing reasons, the Commission should summarily dismiss the Cbeyond
Petition.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Harisha J. Bastiampillai
Craig J. Brown
Harisha J. Bastiampillai
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6671
Craig.Brown@qwest.com
Harisha.Bastiampillai@qwest.com

Its Attorneys

January 22, 2010