

**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

**REPLY COMMENTS OF VERIZON**

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**REPLY COMMENTS OF VERIZON<sup>1</sup>**

The Commission's settled policy against requiring the unbundling of advanced broadband infrastructure is as sound today as when the Commission first applied it in 2003. That policy — which the Commission has repeatedly reaffirmed since then and which the courts have repeatedly upheld — was based on the Commission's reasonable determination that not requiring unbundling would give *all* broadband providers the proper incentives to invest in next-generation networks.

The Commission's predictive judgment was clearly correct. Since 2003, broadband penetration has nearly tripled, from 23 percent of households to 66 percent of households, and the number of high-speed Internet lines in the United States has increased nearly six-fold. Investment in fiber broadband infrastructure has been even more explosive. Between 2003 and 2007, incumbent LECs deployed enough fiber to circle the earth almost seven times. Verizon *alone* has committed \$23 billion to its all-fiber FiOS network, which currently reaches roughly 15.4 million premises. This investment and innovation has hardly been limited to incumbent LECs. Since the Commission adopted its current policy, facilities-based intermodal competition

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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.

has flourished, with ILECs, CLECs, cable operators, and fixed and mobile wireless providers all investing in next-generation broadband platforms and competing aggressively for both business and mass-market customers. Any change to the Commission's current unbundling policy would harm small business customers — the ostensible beneficiaries of Cbeyond's petition — and all customers alike, by lessening providers' incentives to continue investing in next-generation broadband infrastructure, thereby standing as a direct obstacle to the Commission's broadband goals.

The comments filed in support of Cbeyond's proposal, no different from the petition itself, have failed to carry the heavy burden of showing that the Commission should abruptly reverse seven years of settled policy with respect to unbundling of advanced broadband networks. The few comments that even address the impairment standard — the "touchstone" of any effort to mandate unbundling under § 251(c)(3) — do not come close to showing that impairment exists. Although that is sufficient reason to deny their unbundling requests, these commenters also offer no credible evidence to support their claims that the Commission's predictive judgments have not come true; to the contrary, broadband investment has been robust, and investment by the communications industry has declined by far less than investment in other sectors of the economy during the current recession.

Finally, some commenters seek to use this proceeding to advance erroneous arguments that the Commission should reverse its prior determination that providers that have deployed fiber loops can retire legacy copper network facilities, and need not retain them indefinitely. As Verizon has explained elsewhere, the Commission should reject those requests. An important benefit of deploying next-generation broadband networks is the ability to retire the costly and less-efficient legacy copper network after fiber has been deployed. Forcing one class of

providers to maintain a parallel, redundant copper network would place those providers at an artificial disadvantage in competition with other broadband providers and would diminish the incentive to deploy fiber in the first place; it would also change the rules late in the game for providers, like Verizon, that made massive investments in fiber in reliance upon the policy set forth in the *Triennial Review Order*.<sup>2</sup>

## DISCUSSION

### I. THE COMMENTS CONFIRM THAT THE COMMISSION'S SETTLED POLICY PROVIDES THE PROPER INCENTIVES FOR INVESTMENT IN NEXT-GENERATION BROADBAND FACILITIES

#### A. The Commission's Policy Has Spurred Massive Investments in Broadband Infrastructure

The Commission's settled determination not to require unbundled access to FTTP and hybrid loops — which was based on “an extensive record developed over more than two years”<sup>3</sup> — is as sound today as it was in 2003. The data on broadband investment and fiber deployment confirm that the Commission's predictive judgment that refusing to mandate broadband unbundling would spur broadband investment was correct. *See* Verizon Comments at 9-15. Since 2003, broadband penetration has nearly tripled, from 23 percent of households to 66 percent of households.<sup>4</sup> The number of high-speed Internet lines in the United States increased almost six-fold between 2003 and 2008, from nearly 23 million to 132.8 million.<sup>5</sup> By some estimates, cumulative capital expenditures by broadband providers from 2000 to 2008 were over

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<sup>2</sup> 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 (2003) (“*Triennial Review Order*” or “*TRO*”).

<sup>3</sup> *Id.* ¶ 272.

<sup>4</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*”).

<sup>5</sup> *See* FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2008*, Table 1 (July 2009).

half a trillion dollars.<sup>6</sup> In 2009, broadband providers were estimated to have invested nearly \$60 billion in their networks.<sup>7</sup>

In particular, investment in next-generation broadband infrastructure has been nothing short of explosive. Between 2003 and 2007, incumbent LECs deployed more than 280,000 kilometers of fiber, enough to circle the earth almost seven times.<sup>8</sup> Verizon *alone* has committed \$23 billion to its all-fiber FiOS network, which currently reaches roughly 15.4 million premises. And AT&T's U-verse fiber-to-the-neighborhood program will reach 30 million living units by 2010.<sup>9</sup> This boom in investment has not been limited to incumbent LECs. Cable operators are also investing in cutting-edge broadband infrastructure such as the DOCSIS 3.0 platform, which offers the potential for speeds of 100 Mbps and higher; Comcast expects to offer this service throughout its footprint by the end of the year.<sup>10</sup>

Wireless broadband providers, too, are investing heavily to “quickly upgrade and enhance their networks, which is resulting in 3G and 4G build activity.”<sup>11</sup> The four largest wireless providers invested \$10.4 billion in their broadband capabilities in 2008 and \$11.8 billion in 2009.<sup>12</sup> The roll-out of 4G wireless networks will provide a competitive alternative to

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<sup>6</sup> See Comments of United States Telecom Ass'n, *Preserving the Open Internet: Broadband Industry Practices*, GN Docket No. 09-191, at 6 (filed Jan. 14, 2010) (“U.S. Telecom Comments”) (citing U.S. Dept't of Commerce, National Telecommunications and Information Administration, *Networked Nation: Broadband in America 2007* 32-34 (Jan. 2008)).

<sup>7</sup> *Id.* (citing data from Yankee Group Research).

<sup>8</sup> See FCC, ARMIS Infrastructure Report, FCC Report 43-07, Table II.

<sup>9</sup> See *CITI Report* at 15.

<sup>10</sup> See Comments of Comcast Corp., *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 37-39 (filed June 9, 2009).

<sup>11</sup> Simon Flannery et al., Morgan Stanley, *3Q Trend Tracker: Signs of Life for Telecom* 67 (Dec. 4, 2009).

<sup>12</sup> See *CITI Report* at 66, Table 15.

wireline broadband for many consumers; Clearwire, for example, advertises its 4G WiMAX service — which offers average download speeds of 3-6 Mbps — as “offer[ing] speeds comparable to cable and DSL for home and up to 4x faster than you can get with mobile broadband from a cellular company.”<sup>13</sup> CLECs have also deployed more than 100,000 route miles of fiber to tens of thousands of office buildings, and there is an average of six fiber-based broadband providers in each of the 50 largest MSAs.<sup>14</sup> Nationwide, there are currently more than 600 facilities-based providers offering fiber broadband service; collectively, these providers serve 1.1 million customers.<sup>15</sup>

Notably, the leading *manufacturers* of fiber optic cable and telecommunications equipment — who have a direct interest in maximizing investment in broadband networks — unequivocally support the Commission’s current policy. Corning, the leading producer of fiber-optic cable in the United States, asserts that Cbeyond’s proposal is “contrary to the Commission[’s] recognized need for more investment to upgrade the broadband infrastructure with next-generation capability.” Corning Comments at 2. Similarly, the Telecommunications Industry Association — which represents 600 manufacturers and suppliers of broadband equipment, services, and applications — concludes that the Commission’s current policies “have been exceedingly successful, prompting an explosion in next-generation facilities investment and deployment and a concomitant rise in broadband adoption.” TIA Comments at 2. The D.C. Circuit has emphasized that manufacturers of telecommunications equipment such as these

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<sup>13</sup> See CLEAR, Unlimited Mobile Internet FAQs, <http://www.clear.com/shop/services/mobile?id=226&market=42>.

<sup>14</sup> See Patrick Brogan & Evan Leo, USTelecom, *High-Capacity Services: Abundant, Affordable, and Evolving* 24-25 & Table 7 (July 2009) (“USTelecom 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>15</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.

commenters “have the incentive to make a completely unbiased judgment” about the likely effects of Commission policy because their goal is to sell as many goods and services as possible.<sup>16</sup>

Moreover, the comments of the Independent Telephone and Telecommunications Alliance make clear that the investment disincentives created by an unbundling mandate would be especially strong in rural and high-cost areas. The Alliance notes that, “[i]n lower-density markets, and for small business customers, the economics of fiber deployment are already difficult.” ITTA Comments at 7. Intrusive unbundling policies that allow CLECs to share in the rewards — but not the risks — of fiber rollout will only worsen the business case for fiber deployment in rural, high-cost, and less-densely populated areas. The policy change sought by Cbeyond would thus stand as a direct obstacle to the Commission’s longstanding goal of universal broadband deployment.

Especially as the Nation is emerging from a recession, it is crucial that the Commission preserve the right incentives for investment and innovation in the broadband marketplace. Broadband deployment and usage is a significant factor driving economic growth and job creation. Drs. Crandall, Lehr, and Litan have estimated that a one-percent increase in broadband penetration translates into a 0.2 to 0.3 percent increase in employment; nationwide, that suggests an additional 300,000 jobs either added or saved.<sup>17</sup> The same study found that “employment in

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<sup>16</sup> *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

<sup>17</sup> See Robert Crandall, William Lehr & Robert Litan, *The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data*, The Brookings Institute: Issues in Economic Policy 2 (July 2007).

both manufacturing and service industries (especially finance, education and health care) is positively related to broadband penetration.”<sup>18</sup>

In a follow-up study, Drs. Crandall and Singer found that first-generation broadband technologies such as cable modem, DSL, and 3G wireless were *directly responsible* for creating 434,100 jobs.<sup>19</sup> They predict that job creation will only continue to increase as providers make massive investments in next-generation broadband platforms such as FTTP, DOCSIS 3.0, and 4G wireless.<sup>20</sup> These new broadband services will also lead to positive “spillover effects” that drive investment and job creation in other sectors of the economy; more than 1.3 million jobs may ultimately be created due to the deployment of second-generation broadband infrastructure.<sup>21</sup>

Moreover, state-of-the-art broadband networks — which enable telecommuting, telemedicine, distance learning, e-commerce, and social networking — provide countless benefits to consumers, *especially* those who live in rural communities; these applications also enable consumers to save billions of dollars on transportation costs, which, in turn, helps protect the environment.<sup>22</sup> Drs. Crandall and Singer caution, however, that the enormous positive impact of next-generation broadband networks could be jeopardized by “new regulatory changes [that] undermine the incentives of [providers] to continue to invest.”<sup>23</sup> Any changes to the Commission’s existing policy — which gives *all* providers the proper incentives to invest in

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<sup>18</sup> *Id.*

<sup>19</sup> See Robert Crandall & Hal Singer, *The Economic Impact of Broadband Investment* at 2 (forthcoming Feb. 2010).

<sup>20</sup> See *id.* at 38-39.

<sup>21</sup> *Id.* at 47-48.

<sup>22</sup> See *id.* at 31-36.

<sup>23</sup> *Id.* at 4.

cutting-edge broadband infrastructure — would thus jeopardize job growth not only in the communications industry, but across many other sectors of the economy as well.

In sum, the Commission's predictive judgments have been proven correct. Just as the Commission predicted in the *Triennial Review Order*, deployment of next-generation broadband networks has been explosive. The broadband marketplace is currently characterized by continuous innovation and robust intermodal competition between a variety of different providers. There is simply no reason to disrupt this market and discard the policies that have laid the foundation for this success.

**B. Many Different Providers Are Competing Aggressively for Small Business Customers**

Cbeyond and others supporting its proposal assert that unbundling is required to bring broadband to small businesses. They are wrong. It will have the opposite effect.

As an initial matter, Verizon has long been aware of the unique issues facing small businesses, and offers a number of products and services that are tailored to the needs of these firms — including plans that offer small businesses up to 35 Mbps symmetrical upload and download speeds over Verizon's all-fiber FiOS network.<sup>24</sup> Other incumbent LECs also offer a wide range of broadband services that are specifically designed for small-business customers. *See* AT&T Comments at 24-25; Qwest Comments at 7-10.

But telephone companies are hardly the only broadband providers targeting small and medium businesses. In the past few years, the five largest cable operators have announced plans to invest several billion dollars to expand their business offerings, including high-capacity services.<sup>25</sup> For example, Comcast alone plans to invest more than \$3 billion in business services

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<sup>24</sup> *See* <http://smallbusiness.verizon.com/>; <http://mediumbusiness.verizon.com/>.

<sup>25</sup> *USTelecom Report* at 9.

between 2007 and 2012.<sup>26</sup> That investment is helping cable operators gain market share; the leading cable companies already serve nearly one million business customers, and their revenue from business services is growing by 15-20 percent per year.<sup>27</sup> Cable operators “have made [small and medium-sized businesses] their primary growth initiative,” and are “competing particularly aggressively” for these customers.<sup>28</sup> Comcast has identified five million small- and medium-sized businesses within its footprint and has announced plans to actively pursue these firms.<sup>29</sup> Similarly, Cox offers business broadband services at “[s]peeds to fit all your needs,” “[w]hether you’re a small, growing business or a large, established enterprise.”<sup>30</sup> It is projected that, by next year, cable providers will double their share of the small and medium business market segment.<sup>31</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>32</sup> This service is rapidly being deployed in urban and suburban areas — as well as areas in which demand tends to be less concentrated — and it is seen as “a particularly attractive substitute for the ILECs’ DS-1 and

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<sup>26</sup> *See id.* at 10, Table 1.

<sup>27</sup> *See id.* at 9; *see also id.* at 14-15, Table 3.

<sup>28</sup> Craig Moffett et al., Bernstein Research, *U.S. Telecom: Enterprise Services . . . Time for a Star Turn?* 17 (Mar. 25, 2008); *USTelecom Report* at 15-16.

<sup>29</sup> *USTelecom Report* at 11.

<sup>30</sup> *Id.* at 14, Table 3 (internal quotation marks omitted).

<sup>31</sup> *See* Jessica Reif Cohen, Bank of America/Merrill Lynch, *The Enterprise: Cable’s Next Frontier* 4 (Sept. 9, 2009).

<sup>32</sup> Memorandum Opinion and Order, *AT&T and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, ¶ 48 (2007); *see also USTelecom Report* at 16-19 & n.45.

DS-3 special access services.”<sup>33</sup> More than a dozen fixed wireless providers currently offer a wide range of broadband services to small, medium, and large businesses; many of these providers 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>34</sup> For example, Covad Wireless offers a “flexible, scalable and cost effective business-quality broadband service” at symmetrical speeds between 768 Kbps and 6 Mbps, “up to four times the speed of a conventional land line T1.”<sup>35</sup> Covad emphasizes that this service “is the perfect choice for mission critical business applications and companies of any size.”<sup>36</sup>

Mobile wireless providers are also investing heavily in deploying 4G broadband networks. 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>37</sup> Sprint already provides 4G service to 27 markets and plans to expand coverage to Boston, Houston, New York, San Francisco, and Washington, DC in 2010.<sup>38</sup> By the end of the year, Clearwire’s 4G network will cover 120 million people in 80 markets.<sup>39</sup> Many of these providers offer speeds that are well-suited to the needs of small businesses. For example, both Sprint and Clearwire offer 4G broadband service with average download speeds of 3-6 Mbps and average upload speeds of

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<sup>33</sup> *USTelecom Report* at 17.

<sup>34</sup> *Id.* at 17-22 & Tables 4-6.

<sup>35</sup> See <http://www.covadwireless.com/services-super-t.html>.

<sup>36</sup> *Id.*

<sup>37</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).

<sup>38</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>39</sup> See Simon Flannery & Sean Ittel, Morgan Stanley, *Clearwire Corporation: 2Q09 Preview: Market Rollout and Wholesale Launches Progressing* 4 (Aug. 10, 2009).

roughly 1 Mbps.<sup>40</sup> And Clearwire’s “CLEAR Professional” plans provide additional features such as dedicated support lines and enhanced security.<sup>41</sup>

In sum, there is no merit to the contentions that an unbundling mandate tailored to the business plans of a handful of providers is necessary to enable small businesses to obtain the benefits of broadband. Small businesses — like *all* customers — would suffer if the Commission were to reverse course on its unbundling decisions. At the very least, imposing unbundling obligations on one among the various competing providers will serve to *reduce* the competitive options available to small businesses. This policy change would deter investment by the companies directly subject to an unbundling obligation as they are forced to rethink their ability to justify making the large fixed capital investments necessary to serve these customers. Moreover, an unbundling mandate will ultimately result in less investment in next-generation broadband networks by all providers to serve all customers, given the heightened investment risk (and the corresponding increased cost) created by the prospect that the Commission might expand the obligation at any time once it starts down this ill-advised path.

## **II. REVERSAL OF THE COMMISSION’S LONG-STANDING DECISIONS NOT TO REQUIRE UNBUNDLING OF FIBER LOOPS WOULD BE UNLAWFUL**

### **A. There Is No Impairment Without Unbundled Access to FTTP and Hybrid Loops**

As the courts have made clear, impairment is the “touchstone” of the unbundling analysis; if “competition is possible” in the absence of the requested UNEs, there is no impairment and the Commission has no power to order unbundling.<sup>42</sup> The burden is on those

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<sup>40</sup> See <http://www.clear.com/shop/services/mobile?id=226&market=42>;  
[http://www.nextel.com/en/solutions/mobile\\_broadband/mobile\\_broadband\\_4G.shtml](http://www.nextel.com/en/solutions/mobile_broadband/mobile_broadband_4G.shtml).

<sup>41</sup> See <http://clearprofessional.net/>.

<sup>42</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) (“*USTA II*”).

seeking an unbundling mandate to submit “substantial evidence” demonstrating that the impairment standard is satisfied.<sup>43</sup>

As explained above, a number of different providers are demonstrably capable of deploying their own fiber loops — or high-speed broadband wireless “loops” — and using those facilities 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. 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.<sup>44</sup>

In fact, the D.C. Circuit previously invalidated an unbundling requirement that is directly analogous to what Cbeyond advocates here. Specifically, the Commission previously imposed a requirement to unbundle and make available to other carriers a packetized transmission path over their local facilities which it referred to as line sharing. The Court vacated that requirement, however, precisely because the existence of competing broadband services from cable showed that it was possible to compete without unbundling. The court emphasized that when intermodal competition exists, there is “no reason to think [an unbundling mandate] would bring on a significant enhancement of competition.”<sup>45</sup> Since the D.C. Circuit decided *USTA I* in 2002, incumbent LECs have faced even *stronger* competition from a much wider array of broadband providers. Any finding of impairment in the face of such competition would clearly be unlawful.

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<sup>43</sup> *Id.* at 582.

<sup>44</sup> See *Covad Communications Co. v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006) (“The fact that CLECs *can* viably compete without UNEs . . . *precludes* a finding that the CLECs are impaired.”) (internal quotation marks omitted, emphases added)

<sup>45</sup> *USTA I*, 290 F.3d at 429.

Of the comments filed in support of Cbeyond, only Covad makes any real effort to demonstrate impairment, relying on a QSI report that purportedly shows that it is not economically viable for CLECs either to lease unbundled fiber loops at market rates or to build their own last-mile broadband facilities.<sup>46</sup> The QSI report does not support a finding of impairment.

The primary flaw in that report is that it focuses only on the narrow issue of ILEC-CLEC competition; it does not even *mention* the robust intermodal competition among multiple broadband platforms and providers that has developed since the *Triennial Review Order*. Of course, such facilities-based competition is the ultimate goal of the 1996 Act.<sup>47</sup> The existence of intermodal competition among multiple providers precludes a finding of impairment. As explained above, when the Commission ordered DSL line sharing without considering the effects of intermodal competition, the D.C. Circuit vacated the order, faulting the Commission for its “naked disregard of the competitive context.”<sup>48</sup>

The QSI report is also flawed because it purports to analyze impairment through the lens of one specific type of service — namely, a 5 Mbps Ethernet-based broadband service.<sup>49</sup> In the *Triennial Review Order*, however, the Commission emphasized that it “will not . . . evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are

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<sup>46</sup> See Covad Comments at 12-14, 18-19; August H. Ankum et al., QSI Consulting, Inc., *Viability of Broadband Competition in Business Markets* (Jan. 21, 2010) (“QSI Report”) (Ex. A to Covad Comments).

<sup>47</sup> *USTA I*, 290 F.3d at 424.

<sup>48</sup> *Id.* at 429.

<sup>49</sup> See QSI Report at 14-15. PAETEC’s brief discussion of impairment contains a similarly narrow analysis. See PAETEC Comments at 9-10.

impaired without access to UNEs.”<sup>50</sup> The Commission rejected a “business plan-specific approach” to assessing impairment, finding that it “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>51</sup> Indeed, some of the commenters supporting Cbeyond’s petition are requesting *different* — but equally specific — types of unbundling,<sup>52</sup> further demonstrating that these firms are simply seeking unbundling in a manner that would suit their particular business plans.

Finally, several of the commenters that support Cbeyond assert that they provide innovative broadband services and have achieved success in a variety of different market segments.<sup>53</sup> This purported competitive success — which was achieved *without* access to unbundled fiber loops — provides further evidence that “competition is possible” without unbundled access to the requested network elements and thus there is no impairment.

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<sup>50</sup> *TRO* ¶ 115; see also *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999) (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.”).

<sup>51</sup> *TRO* ¶ 115.

<sup>52</sup> See Covad Comments at 2 (“Covad proposes that a high-bandwidth connection between 6 and 45 Mbps be provided to CLECs, which would fill the gap between existing DS1 service at 1.544 Mbps and DS3 service at 44.736 Mbps.”).

<sup>53</sup> See XO Comments at 1-2 (asserting that XO provides “state-of-the-art business and carrier services to more than 90,000 customers,” and that XO’s facilities include “one million miles of metro fiber,” an “18,000-route mile, nationwide, 1.2 Terabit inter-city network,” a “[r]obust switching platform,” and “[m]ore than 3,000 fiber-fed buildings on net”); Integra Telecom & One Communications Comments at 3 (asserting that Integra and One “have found success in the [small and medium business] segment by providing intensive, personalized sales and customer care, along with products specifically tailored to the needs of SMB customers”); Covad Comments at 1 (asserting that Covad offers “a full suite of broadband access solutions, including DSL, T-1, bonded T-1, Ethernet, and other high-bandwidth services, to small and medium sized business and home users” in “44 states and 235 Metropolitan Statistical Areas”).

## **B. The Commission's Decisions Have Spurred Broadband Investment and Deployment**

As explained above, the Commission correctly predicted that its decision not to impose unbundling mandates on advanced broadband infrastructure would promote investment in such facilities. Most of Cbeyond's supporters make no attempt to rebut the Commission's repeated findings about the effects of unbundling on broadband investment. The few comments that do address this issue cannot refute the clear evidence that the Commission's rules have promoted investment in next-generation broadband facilities. For example, PAETEC and Covad rely on the same flawed ETI and Berkman Center reports to which Cbeyond pointed in its petition. *See* PAETEC Comments at 8-18; Covad Comments at 7-17. As Verizon and others have explained at length, those reports present a badly distorted view of the evidence and are inconsistent with rigorous empirical research conducted by many of the leading academics in the field. *See* Verizon Comments at 20-24; TIA Comments at 17-21; Qwest Comments at 17-22; AT&T Comments at 12-15, 23-24.<sup>54</sup>

XO asserts that "wireline capital expenditures" by ILECs declined between 2008 and 2009. XO Comments at 4. But XO ignores that, as the Commission is well aware, the national economy has experienced a significant downturn since 2008. Any declines in capital expenditures during such a downturn hardly show that the Commission's judgment that eliminating unbundling requirements would spur broadband investment needs to be reconsidered. In fact, during the "Great Recession," the communications industry has performed far better than other sectors of the economy. In the first quarter of 2009, total private fixed investment was 20.8 percent lower than in the fourth quarter of 2006, but investment in

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<sup>54</sup> *See also* Comments of Verizon and Verizon Wireless on Study by the Berkman Center, GN Docket Nos. 09-47 et al. (filed Nov. 16, 2009).

communications equipment fell by only 2.5 percent.<sup>55</sup> Many analysts predict that growth will resume in 2010 or 2011.<sup>56</sup>

Moreover, XO refers to “wireline capital expenditures” without distinguishing between capital expenditures on broadband and expenditures on legacy networks. As Qwest explains, “the level of *total* capital expenditures . . . is not an indicator of *broadband* or advanced services investment” because “the mix of these expenditures has shifted in the past several years” from a focus on switched access lines to a focus on broadband. Qwest Comments at 19-20. The policy that Cbeyond seeks to discard only applies to advanced broadband infrastructure such as FTTP and hybrid loops. XO offers no data regarding capital investment in broadband networks, but there is every reason to believe that broadband investment will continue in coming years. According to a report prepared by the Columbia Institute for Tele-Information, wireline broadband investment by three leading incumbent LECs was \$11.9 billion in 2008, and is estimated to be \$11.5 billion in 2009, \$12.5 billion in 2010, and \$14 billion in 2011.<sup>57</sup> In other words, despite a very small decrease in 2009, these providers’ annual broadband investment is projected to increase more than 17 percent between 2008 and 2011. And, as explained above, cable operators, wireless providers, and CLECs are also continuing to invest heavily in next-generation networks. In all events, it is indisputable that more customers have far greater access

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<sup>55</sup> See Jeffrey A. Eisenach, Empiris, LLC, *The Telecom Sector and the Economy: How U.S. Broadband Policies are Working for America* 6 (May 2009) (citing data from U.S. Department of Commerce, Bureau of Economic Analysis). Moreover, between February 2008 and February 2009, employment in the information technology sector actually *grew* by 2.5 percent, even as total employment fell by 3.8 percent. *Id.* at 11 (citing Bureau of Labor Statistics data).

<sup>56</sup> See Communications Daily, Vol. 30, No. 6, at 14 (Jan. 11, 2010) (citing analysis by Catharine Trebnick of Avian Securities projecting a 1.5% increase in capital spending for traditional telecom companies and cable operators in 2010); *see also* U.S. Telecom Comments, GN Docket No. 09-191, at 6-7 & n.10.

<sup>57</sup> See *CITI Report* at 30.

to advanced broadband service than ever before. In September 2003, fewer than 200,000 premises were passed by fiber; by September 2009, there were over 17.2 million premises passed by fiber and more than 5.3 million subscribers.<sup>58</sup>

**C. The Costs of Mandatory Unbundling Would Far Outweigh Any Purported Benefits**

Cbeyond asserts that the unbundling of fiber broadband facilities it seeks could be imposed at little or no cost to the government or incumbent LECs. To the contrary, as the Commission and the courts have repeatedly recognized, the costs of unbundling — both direct and indirect — are significant. The D.C. Circuit has emphasized that “mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.”<sup>59</sup> The unbundling Cbeyond seeks — a packetized bit stream transmission path tailored to its business plan — would create difficult technical issues about how to construct fiber networks in a manner that will provide shared access to rivals. For example, Verizon’s network is not currently designed to segregate and route multiple providers’ packetized traffic; adding these capabilities would require the development of new hardware, software, and traffic management processes, as well as new measures for keeping such data secure. *See* Verizon Comments at 17-20. Qwest also emphasizes that it would have to “re-engineer the network” in order to provide the service Cbeyond seeks. Qwest Comments at 30-31.

In addition to these direct costs, *any* unbundling mandate would impose administrative oversight costs with regard to the terms and conditions of the forced sharing. Indeed, attempting

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<sup>58</sup> *See* TIA Comments at 9 (citing Michael C. Render, Presentation: Fiber-to-the-Home Council N.A., North American FTTH/FTTP Status (Sept. 2009)).

<sup>59</sup> *USTA I*, 290 F.3d at 429.

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. All of these costs would divert resources that instead could have been devoted to greater broadband deployment.

Cbeyond contends that the costs of unbundling would be minimized if CLECs were required to pay so-called “retail” prices for the service at issue. As an initial matter, if there were an existing “retail” product that provided the service Cbeyond seeks through unbundling, Cbeyond could purchase that product today. But, as explained above, the service that Cbeyond wants ILECs to be required to supply simply does not exist. There is thus 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.

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 marketplace. But in the absence of impairment, the Commission has quite correctly concluded that “the market price should prevail, as opposed to a regulated rate.”<sup>60</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-

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<sup>60</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.

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>61</sup>

**D. Requiring Unbundling at TELRIC Rates Would Be Especially Harmful to Broadband Investment, Deployment, and Competition**

Although Cbeyond does not request it, any unbundling mandate will quickly be followed by a demand to apply TELRIC pricing to unbundled fiber loops. In fact, two of the commenters already argue precisely that. *See XO Comments* at 9-11; *Covad Comments* at 17. Those proposals would be even more harmful to competition than Cbeyond’s request. The Commission has emphasized that TELRIC pricing “create[s] disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities.”<sup>62</sup> Courts have similarly found that forcing ILECs to charge very low, regulated rates for access to their networks “reduce[s] or eliminate[s] the incentive for an ILEC to invest in innovation” because “it will have to share the rewards with CLECs.”<sup>63</sup> Likewise, TELRIC pricing creates a disincentive “for a CLEC to innovate” because “it can get the element cheaper” at TELRIC rates.<sup>64</sup> And, of course, TELRIC pricing may only be applied “where impairment is found to exist”<sup>65</sup> — as explained above, Cbeyond and its supporters have failed to carry their burden of establishing that competition is impaired without the requested UNEs.

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<sup>61</sup> *EarthLink, Inc. v. FCC*, 462 F.3d 1, 13 (D.C. Cir. 2006).

<sup>62</sup> Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 36 (2004).

<sup>63</sup> *USTA I*, 290 F.3d at 424; *see also USTA II*, 359 F.3d at 572 (TELRIC pricing “discourage[s] . . . investment in innovation”).

<sup>64</sup> *USTA I*, 290 F.3d at 424.

<sup>65</sup> *TRO* ¶ 656; *see also USTA II*, 359 F.3d at 589.

**E. Reversal of the Commission’s Settled Policy Would Raise Serious Constitutional Concerns**

Verizon and other providers relied on the Commission’s explicit rulings to take massive investment risks without the threat of competitors free-riding off this investment. The current proposals to reverse course would change the rules late in the game and penalize providers for their reasonable reliance on settled policy. An about-face on the Commission’s decisions not to require unbundling of broadband facilities would thus raise serious constitutional questions. As the Supreme Court has emphasized, a “decision to arbitrarily 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 benefit of good investments at others would raise serious constitutional questions.”<sup>66</sup> That is precisely what would occur if the Commission, after inducing broadband providers to invest tens of billions of dollars in fiber networks, denied them the benefits of those investments by re-imposing forced sharing. Therefore, unlike the takings challenge to the Commission’s TELRIC rules — which the Supreme Court rejected while noting that there had been “no ‘switch’ of methodologies,” no “opportunistic switch ‘back and forth,’” and no “promise” by the government to use a particular methodology<sup>67</sup> — the reversal of course that Cbeyond and others urge on the Commission would raise substantial questions under the Takings and Due Process Clauses.

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<sup>66</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>67</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 527-28 (2002).

### III. THE COMMISSION SHOULD NOT CHANGE ITS COPPER RETIREMENT POLICIES

Even though this issue was not raised in Cbeyond’s petition and is currently pending in another Commission docket<sup>68</sup> — in which extensive comments have been filed — PAETEC and XO seek to use this proceeding to repeat claims that the Commission should reverse settled policy and limit providers’ ability to retire the legacy copper network after they have deployed fiber. *See* XO Comments at 5-9; PAETEC Comments at 5. Like the unbundling mandate Cbeyond seeks, those proposals — which would penalize providers who invested tens of billions of dollars in fiber infrastructure in express reliance upon the Commission’s policy — stand as a direct obstacle to the Commission’s longstanding goal of providing high-speed broadband access to all Americans over next-generation broadband facilities.

As part of its decision not to require unbundling of FTTP loops, the Commission made clear that providers could retire legacy facilities after they deployed fiber.<sup>69</sup> Several CLECs sought rules that would have required affirmative regulatory approval prior to the retirement of any copper loop facilities. The Commission rejected those proposals, finding that “such a requirement is not necessary at this time because our existing rules, with minor modifications, serve as adequate safeguards.”<sup>70</sup> Those rules simply require companies to provide public notice

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<sup>68</sup> *See* *Petition for Rulemaking and Clarification of BridgeCom International, Inc., Broadview Networks, Inc., Cavalier Telephone LLC, et al.*, RM-11358 (filed Jan. 18, 2007); *Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc.*, RM-11358 (filed Jan. 18, 2007).

<sup>69</sup> *TRO* ¶ 281 (“We decline to impose a blanket prohibition on the ability of incumbent LECs to retire any copper loops or subloops they have replaced with FTTH loops.”).

<sup>70</sup> *Id.*; *see also id.* ¶ 294, n.847 (“[I]ncumbent LECs may remove copper loops from their plant so long as they comply with our Part 51 network notification requirements . . . and any applicable state law.”).

of any planned copper retirement, including “the planned date for retiring a copper loop and a description of the reasonably foreseeable impact of the planned changes.”<sup>71</sup>

The Commission’s current copper-retirement rules are an integral part of its broader pro-investment framework for broadband. When Verizon began its \$23 billion FiOS program, it expressly relied upon the Commission’s unambiguous assurance that Verizon would be able to retire legacy copper network facilities after deploying fiber to replace them. Indeed, the ability to retire the redundant legacy network is one of the key benefits of deploying fiber.<sup>72</sup> Fiber networks are faster, more efficient, and more reliable than copper networks. For example, fiber lines require no mid-span equipment or electronics (*e.g.*, repeaters, terminals, remotes, etc.), which means they are cheaper to maintain and have fewer potential points of failure than copper lines. Fiber is also more durable and requires fewer repairs. For example, in 2007, Verizon’s rate of maintenance dispatches was *eighty percent* lower for its FiOS network than for the copper network.<sup>73</sup>

The benefits of fiber deployment would be diminished if providers were also required to maintain a redundant and less-efficient copper network solely for the benefit of their competitors. This would not be as simple as just leaving copper lines in the ground. In addition to the lines themselves, Verizon would be forced to operate and maintain related equipment such as load coils, terminals, service wires, pedestals, and feeder distribution interface cabinets. Verizon would also have to maintain legacy operations systems for inventory, service orders, cost

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<sup>71</sup> *Id.* ¶ 281. Parties may file objections to a planned copper retirement, but the Commission will “deem all such oppositions denied unless the Commission rules otherwise upon the specific facts and circumstances of the case at issue.” *Id.* ¶ 282.

<sup>72</sup> *See* Comments of Verizon on Copper Retirement Petitions, RM Docket No. 11358, at 13-21 (filed Mar. 1, 2007).

<sup>73</sup> *See id.* at 16.

assignment, and wholesale billing, even though none of those systems are used with the next-generation FiOS network. Forcing providers to maintain copper facilities after they have deployed fiber would be like requiring a factory to continue operating its old machines after it purchased new, state-of-the-art equipment. Such a rule would be wasteful and inefficient, and would create a substantial disincentive to invest in new technologies in the first place, at a time when the Commission seeks to encourage *greater* investment in next-generation broadband networks. The added costs of maintaining duplicate networks and systems beyond when it makes business sense to do so ultimately would be borne by consumers.

Moreover, any limitations on copper retirement would artificially skew competition in the broadband marketplace by imposing a unique burden on only one category of broadband providers. Cable operators, fixed and mobile wireless providers, facilities-based CLECs, satellite providers, and future entrants could all focus on exactly one task — bringing the best possible broadband services to their customers. Incumbent LECs, in contrast, would be forced to maintain a costly, redundant, legacy network — which they would not be using for their own retail operations — in addition to their next-generation fiber facilities.

In sum, the Commission's current policies are designed to facilitate — and, indeed, *have* facilitated — investment in cutting-edge broadband infrastructure. The changes to the existing copper-retirement rules that some seek, in contrast, would entrench the legacy network at the expense of next-generation facilities. Other companies would have little incentive to deploy their own fiber facilities as long as they are guaranteed indefinite access to the copper network. And the providers deploying fiber would have less incentive to make new investments in fiber networks, while such a rule change would also arbitrarily reduce the value of past investments made in reliance on the Commission's decision not to prohibit copper retirement. Consistent

with the Commission's goal of encouraging broadband investment and innovation in order to increase the capabilities of the Nation's broadband infrastructure, the Commission should reject calls to reverse course on its long-standing decision not to restrict providers' ability to retire redundant copper facilities.

### CONCLUSION

For the foregoing reasons, and those set forth in Verizon's comments, the Commission should deny the petition.

Respectfully submitted,

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