

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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 Pursuant	)	
To 47 U.S.C. §251(c)(3)	)	
	)	

**REPLY COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION  
AND  
PETITION TO DISMISS AS PROCEDURALLY DEFECTIVE**

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**I. Introduction and Executive Summary**

USTelecom is pleased to provide these reply comments in response to Cbeyond’s petition for expedited rulemaking.<sup>1</sup> Cbeyond consistently ignores the legal impediments to its request and instead relies solely upon unsupported policy arguments. But these policy arguments rest on assumptions regarding the dearth of competition in the small businesses that are patently false. As demonstrated by USTelecom,<sup>2</sup> in the data cited by Verizon and AT&T in this proceeding, and in various analysts’ reports and other statistics, the small business market which Cbeyond seeks to serve is highly competitive and well served by wireline providers (including by its own admission, Cbeyond itself), as well as by cable and fixed wireless. Moreover, Cbeyond already

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<sup>1</sup> Petition for Expedited Rulemaking, *Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act*, WC Docket No. 09-223 (filed Nov. 16, 2009) (Cbeyond Petition).

<sup>2</sup> See *U.S. Telecom, High-Capacity Services: Abundant, Affordable, and Evolving* (July 2009) (“USTelecom Fact 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).

has access to unbundled copper and hybrid loops that are more than capable of providing the rate of “between 6 and 10 Mbps” that Cbeyond says it needs to offer “big business” services to its small business customers.<sup>3</sup>

The Cbeyond Petition is a tangled web of inconsistencies and internal contradictions. Cbeyond styles its petition as “seeking adoption of rules requiring incumbent LECs to provide unbundled access, pursuant to Section 251(c) of the Act, to the packetized bandwidth of hybrid fiber-copper loops, fiber-to-the-home (FTTH) loops and fiber-to-the-curb (FTTC) loops, at the same rates that incumbent LECs charge their own retail customers, for the purpose of serving small business customers.”<sup>4</sup> Cbeyond fails to explain how the “retail rate” is to be calculated for a service that does not exist or on what legal basis the Commission could authorize the use of such a “retail rate” rather than the “wholesale rates” mandated under section 251(c)(4)(A) of the Act.<sup>5</sup> Were Cbeyond asking only for this relief, given the robust competition in the small business market and its own ability to compete successfully in that market, Cbeyond’s Petition would be legally insufficient. But Cbeyond is asking for much more than that: it wants access to a type of packetized end-to-end service of its own definition.<sup>6</sup> Cbeyond provides no legal

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<sup>3</sup> Compare Cbeyond Petition at 21 with Comments of AT&T at 21 (stating that the unbundled loops that are already available to Cbeyond give it even *greater capacity*....A DS-3 loop, for example, offers 44.7 Mbps of capacity, which is many times the amount that Cbeyond supposedly needs. Cbeyond also could obtain multiple DS-1 loops at a given location.”).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> In Footnote 43 of its Petition, Cbeyond suggests without further explanation, that the “simplest way for the FCC to apply a retail price to our unbundled network element made available under section 251(c)(3) is to forbear from the application of Section 252(d)(1) and Section 51.503-51.513 of this Commission’s rules....” Petition at p. 13 note 43. Cbeyond’s one-line reference patently fails to satisfy the Commission’s requirements for filing of forbearance requests and USTelecom hereby petitions the Commission to dismiss Cbeyond’s filing as procedurally defective.

<sup>6</sup> See Cbeyond Petition at 21-22 (seeking “a high bandwidth connection, between 6 and 10 Mbps” over a bitstream transmission path from the small business end user to a central aggregation point in the incumbent LEC’s network in the LATA”).

authority, and there is none, that would allow the Commission to grant unbundled access to such end-to-end services, rather than to the network elements covered by section 251.<sup>7</sup>

Assuming that Cbeyond were asking for relief cognizable under section 251, Cbeyond's showing falls woefully short of the "impairment standard" required for the Commission to grant Cbeyond access to unbundled network elements for many reasons. Under this standard, an ILEC must unbundle its network elements "only in situations where [the Commission] find[s] that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."<sup>8</sup> Cbeyond cannot show that it is "genuinely" impaired because it has access to network elements capable of providing the bandwidth it needs. Its argument that these are "too expensive" when offered at TELRIC rates cannot stand. The Commission has clearly stated that it will not grant access to unbundled network elements simply to support a carrier's business plan.

Unbundling here would "frustrate sustainable, facilities-based competition."<sup>9</sup> Cbeyond makes no argument that granting its request would allow it to build out further facilities. Rather it is seeking to piggy-back on the advanced facilities created by ILECs substantial investment. Granting the petition would deter facilities-based competition and imperil the private investment necessary to bring advanced communications networks to all Americans. The Broadband Task force has determined that it will take at least \$350 billion dollars to build out sufficient broadband infrastructure to provide Internet access to all Americans and that the lion's share of that investment must come from the private sector. Yet the great weight of the evidence and the

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<sup>7</sup> See AT&T Comments at 16 & n. 53.

<sup>8</sup> Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 at ¶ 2 (2005).

<sup>9</sup> *Id.*

judgment of the Commission and courts alike is that unbundling of fiber network elements would impede the private investment in advanced infrastructure necessary to achieve our nation's goals.<sup>10</sup> As the Commission makes its final deliberations in the National Broadband, it must be mindful that private investment in broadband infrastructure increased significantly after the Commission and courts established with certainty that ILECs were not required to unbundle advanced fiber loops. There is no evidence that such investment would have occurred or that it will continue at this crucial time were unbundling of fiber loops required.

Congress instructed the Commission in section 706(a) of the Telecommunications Act of 1996 to “encourage the deployment on a reasonable and timely basis the deployment of advanced telecommunications services to all Americans.” And, as Congress stated in section 706(b), one of the principal ways for the Commission to ensure rapid deployment of advanced services is “by removing barriers to infrastructure investment.” The Commission carefully balanced its statutory obligations under section 706 against the potential for some impairment in making the decision that Cbeyond now seeks to overturn.<sup>11</sup> It would be unfortunate for the nation if the Commission were to ignore this Congressional mandate, the weight of the economic evidence, its own prior policy judgments, and the precedent of all reviewing courts, and take the unproven and reckless course of granting Cbeyond's self-serving and incoherent petition. As the

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<sup>10</sup> See, e.g., 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 at ¶ 3 (2003) (Triennial Review Order), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II). (“The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.”)

<sup>11</sup> *Id.* at ¶ 173 (We have, however, used this authority to inform our consideration of unbundling in contexts where some level of impairment may exist, but unbundling appeared likely to undermine important goals of the 1996 Act. Specifically, in our analyses of fiber-to-the-home (FTTH) and hybrid loops, we have considered the goal set forth in section 706 of the Act, that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” as well as the presence of intermodal competition.”).

Commission stands poised to provide a broadband plan for the nation that will bring advanced broadband services to all Americans, it makes no sense to erect a new barrier to broadband investment in search of speculative and illusory benefits to support one carrier's business plan. If, despite the overwhelming evidence to the contrary, the Commission were somehow to determine that unbundling of broadband networks were a desirable policy outcome, it would still make no policy, economic, or legal sense to limit such rules to incumbent LECs. The facilities at issue in this request are new investment, broadband facilities providing information services, and incumbent LECs have no inherent advantage in the deployment of such facilities. Thus, any requirements imposed by the Commission along the lines advocated by Cbeyond should apply equally to all broadband providers, including cable, fixed wireless and competitive LECs.

Finally, USTelecom requests that the Commission dismiss Cbeyond's Petition as procedurally defective. Cbeyond has, in passing, requested that the Commission conditionally exercise its forbearance authority in order to apply the "retail rate" rather than the pricing standard under Section 252(d)(1). Cbeyond's summary request in a footnote patently fails to satisfy the Commission's own procedural requirements for requests for forbearance.

## **II. Contrary to Cbeyond's Representations, the Small Business Market is Characterized by Intense and Growing Intermodal Competition**

The entire premise of the Cbeyond Petition for unbundled access is undermined by the fact that competition for small and medium business customers is intense and growing, which in turn undermines claims that customers face a bottleneck in gaining access to productivity-enhancing broadband applications. Perhaps the most significant development over the last several years has been intermodal entry in the small and medium business markets.

As the National Cable & Telecommunications Association (NCTA) has stated, “many cable operators provide high-capacity services that compete with special access services offered by incumbent local exchange carriers.... Cable operators offer these services to businesses and to telecommunications providers and in most cases they own the facilities used to provide these services.”<sup>12</sup> Cable providers in particular have aggressively targeted small business customers with a great deal of success to date and expectations for continued success in the future. It is estimated that cable operators generated \$4.6 billion in commercial services revenue in 2009, marking a 35% annual increase over 2008.<sup>13</sup> Building on its success—largely, but not exclusively, in the small business market—the cable industry is now gearing up to aggressively expand its presence in the medium-sized business and carrier backhaul segments in 2010.<sup>14</sup> In 2010 three U.S. cable operators—Cox, Comcast, and Time Warner Cable—are projected to exceed \$1 billion in commercial services revenue and by 2013 cable operators will have exceeded \$15 billion in annual commercial services revenues—almost 25% of the total U.S. SME communications services market.<sup>15</sup>

As the cable industry continues to take share in small business markets and expand its presence in the mid-sized market, cable operators offer a wide array of powerful products and services capable of competing with traditional incumbents and competitors in this segment.

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<sup>12</sup> *USTelecom High Capacity Fact Report* at page 10 (citing letter of Steve Morris, NCTA, to Marlene Dortch, FCC, WC Docket No. 05-25 (May 8, 2009)).

<sup>13</sup> Tim McElgum, Pike and Fisher, *Cable Commercial Services Strategies: Analysis and Revenue Forecast, 2<sup>nd</sup> Edition* (July 2009) at p. 10.

<sup>14</sup> See, Business Wire, *Fitch News Release: Stiff Competition & Economic Challenges Will Pressure Telecom & Cable Operators in 2010* (December 3, 2009) available at [http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news\\_view&newsId=20091203005599&newsLang=en](http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20091203005599&newsLang=en) (visited February 1, 2010).

<sup>15</sup> Tim McElgum, Pike and Fisher, *Cable Commercial Services Strategies: Analysis and Revenue Forecast, 2<sup>nd</sup> Edition* (July 2009) at p. 10.

Many of the largest cable operators are certified by the Metro Ethernet Forum (MEF) as providers of carrier class Ethernet services.<sup>16</sup> Cable operators are estimated to have 20% of the carrier Ethernet market, and projected to grow that share to 25%-30% in the next several years.<sup>17</sup> While cable Ethernet services are led by Cox, Time Warner Cable, and Cablevision, other cable operators, including Comcast, provide such services.<sup>18</sup> Furthermore, with the deployment of DOCSIS 3.0—capable of delivering speeds of up to 100 megabits per second downstream and 30 megabits per second upstream over hybrid fiber-coax networks<sup>19</sup>—cable operators are now able to provide increasingly compelling offerings, particularly to businesses that may not need higher-end services, e.g., Ethernet over dedicated fiber. Many cable operators have already begun to deploy DOCSIS 3.0, which is projected to be available throughout nearly all of the United States by 2013.<sup>20</sup> Many cable operators are already well on their way to deploying DOCSIS 3.0 throughout their footprints. For example, Comcast, the largest cable operator, will have completed its DOCSIS 3.0 deployment in early 2010.<sup>21</sup>

Fiber-based competitive providers continue to be a significant source of alternative services for small and medium business. As we stated in the *USTelecom High Capacity Fact Report*: “Over the past two decades, competitive providers have invested heavily to deploy fiber networks to serve virtually all areas where demand is concentrated. These fiber networks are

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<sup>16</sup> Metro Ethernet Forum, *List of MEF Certified Companies: Services and Products* available at [http://metroethernetforum.org/page\\_loader.php?p\\_id=33](http://metroethernetforum.org/page_loader.php?p_id=33) (visited February 18, 2010).

<sup>17</sup> Light Reading Insider, *Cable Operators & Ethernet: Serious Business* (Vol.9, No. 12, January 2010) at p. 23.

<sup>18</sup> *Id.* at p. 2.

<sup>19</sup> *USTelecom High Capacity Fact Report* at p. 13.

<sup>20</sup> *Id.*

<sup>21</sup> Seeking Alpha, *Comcast Q4 2009 Earnings Call Transcript* (February 3, 2010) (statement of Comcast CEO Brian Roberts) at <http://seekingalpha.com/article/186373-comcast-q4-2009-earnings-call-transcript> (visited February 3, 2010).

capable of providing high-capacity service to every type of customer (whether a large enterprise, small business, or other carrier) and at every level of capacity from DS-1 (1.544 Mbps) to OCn (51.84 Mbps to 39.81 Gbps) to Ethernet (10 Mbps to 10 Gbps).<sup>22</sup> There are both national and regional providers. At least 28 providers have deployed fiber within the top 50 metropolitan statistical areas (MSAs); there is an average of six fiber-based providers in these MSAs, at least three providers in 45 of these MSAs, and at least five providers in 38 of these MSAs.<sup>23</sup>

Fixed wireless is an additional, rapidly growing alternative for small and medium business services. There are more than a dozen fixed wireless providers offering services using a range of spectrum in areas throughout the country.<sup>24</sup> Fixed wireless providers serve almost all of the top 50 MSAs and they are expanding services within existing markets and expanding adding new markets, including outside the top 50 MSAs.<sup>25</sup> Many fixed wireless providers serve business customers, and several specifically target small and medium businesses.<sup>26</sup> For example, Towerstream, which provides fixed WiMAX access services specifically to small and medium sized businesses (SMBs), recently reported 32% revenue growth in its most recent financial quarter and customer installations 32% greater than its highest previous quarterly.<sup>27</sup> Moreover, fourth generation mobile carrier, Clearwire, is targeting small and medium businesses with its mobile WiMAX service.<sup>28</sup>

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<sup>22</sup> *USTelecom Fact Report* at p. 23.

<sup>23</sup> *Id.* at pp 24-25.

<sup>24</sup> *USTelecom Fact Report* at p. 17,

<sup>25</sup> *Id.* at pp. 17-18 and Table 4.

<sup>26</sup> *Id.* at Table 6, p. 21

<sup>27</sup> Towerstream Press Release, *Towerstream Reports Third Quarter 2009 Results* (November 4, 2009) at <http://ir.towerstream.com/releasedetail.cfm?ReleaseID=421940> (visited February 8, 2010).

<sup>28</sup> *USTelecom Fact Report* at Table 6, p. 21.

In short, the strawman premise asserted by Cbeyond as to why its petition is in the public interest is simply false. To the contrary, the SMB markets arguably are some of the *most* competitive. Rather than being in the public interest, Cbeyond is simply looking for a way to exercise its own business plans without actually investing in infrastructure.

**III. There is Sound and Settled Precedent to Not Require Unbundling of FTTH, FTTC and Hybrid Loops and Cbeyond Fails to Provide a Factual or Legal Basis to Justify a Reversal of this Policy**

**A. There is no authority under section 251 of the Communications Act to grant the Cbeyond Petition**

The Cbeyond Petition begins by asking for “adoption of rules requiring incumbent LECs to provide unbundled access, pursuant to Section 251(c) of the Act, to the packetized bandwidth of hybrid fiber-copper loops, fiber-to-the-home (FTTH) loops and fiber-to-the-curb (FTTC)”.<sup>29</sup> But later in its petition Cbeyond reveals that it is seeking “a bitstream transmission path from the small business end user to a central aggregation point in the incumbent LEC’s network in the LATA, at which point the competitor could pick up the bitstream and carry it back to its network”.<sup>30</sup> This “transmission path” includes all of the ILEC’s packetized, fiber networks, including loops, switching and transport. But the “local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises.”<sup>31</sup> In reality, Cbeyond is not seeking access to a “network element” but rather a low-priced, end-to-end

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<sup>29</sup> Cbeyond Petition at 1.

<sup>30</sup> *Id.* at 21-22.

<sup>31</sup> 47 C.F.R. § 51.319(a).

broadband information *service* tailored to its own specific business plan. Such a request is therefore not cognizable under section 251(c)(3) of the Communications Act.

Moreover, Cbeyond wants to obtain this access “at the same rates that incumbent LECs charge their own retail customers, for the purpose of serving small business customers.”<sup>32</sup> To the best of USTelecom’s knowledge, no ILEC currently offers the precise end-to-end transmission service that Cbeyond has created in its request.<sup>33</sup> Cbeyond’s assertion that its proposal would be relatively painless for ILECs because they could charge this non-existent “retail rate” is ridiculous. As we note, Cbeyond waits until page 21 of their Petition to “clarify” that by retail rate it means “the lowest retail price offered by the incumbent LEC in the relevant MSA.”

Beyond the point that such a rate doesn’t exist, it is indisputable that the costs of serving particular customers across an MSA can vary tremendously. Thus, under Cbeyond’s proposal, the regulate “retail price” it could charge in less dense areas of an MSA would almost certainly be well below cost because it would be driven by the costs associated with serving customers in high-density areas of the MSA. This would likely create an unconstitutional taking. But, in any event, it would completely grind to a halt both ILEC and CLEC investment in broadband infrastructure in these areas—ILEC investment because they would be in the position of not being able to recoup that investment; CLEC investment because it simply would not make economic sense for CLECs to build facilities when they could use the facilities of others at below-cost rates. Moreover, Cbeyond fails to explain how the “retail rate” is to be calculated for a service that does not exist or on what legal basis the Commission could authorize the use of

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<sup>32</sup> Cbeyond Petition. at 1.

<sup>33</sup> Of course, as we explain below, these customers could readily be served by DS1 and DS3 facilities that *are* available to Cbeyond.

such a “retail rate” rather than the “wholesale rates” mandated under section 251(c)(4)(A) of the Act.

### **B. The legal standard for impairment**

Moreover, even assuming *arguendo* that the *service* identified by Cbeyond could somehow be cognizable as an “element” for purposes of section 251(C)(3), Cbeyond has utterly failed to satisfy the legal standard for demonstrating impairment, which is the “touchstone” of the section 251 analysis.

Section 251(c)(3) of the Telecommunications Act of 1996 gives the Commission authority to order ILECs “to provide to any requesting carrier...nondiscriminatory access to network elements on an unbundled basis.” In making the determination whether to grant a request for unbundled access, the Commission must determine whether the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>34</sup>

The impairment standard has been explicated by the Commission and the courts. The Supreme Court made clear that the standard that any standard that the Commission adopts must be “rationally related to the goals of the Act.”<sup>35</sup> Under settled precedent, a telecommunications carrier seeking access to an unbundled network element must demonstrate, among other things, that the lack of access to a network element is “likely to make entry into the market by a reasonably efficient competitor uneconomic.”<sup>36</sup> The courts have insisted that there be a “limiting

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<sup>34</sup> 47 U.S.C. § 251(d)(2)(B).

<sup>35</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999).

<sup>36</sup> 47 C.F.R. § 51/317)(b).

principle” in making this judgment.<sup>37</sup> In particular, the D.C. Circuit cautioned that the Commission should be careful to find impairment only where impairment is “linked (in some degree) to natural monopoly...[and] to cost differentials that would make genuinely competitive provision of an element’s function wasteful.”<sup>38</sup> For this purpose, reliance on the lack of “economies of scale” by the new entrant is insufficient because there are always higher fixed costs when one enters the market.<sup>39</sup> Moreover, the requesting carrier must show that it is suffering a significant degree of impairment that would make the benefits of providing unbundled access outweigh the costs. In sum, an ILEC must unbundle its network elements “only in situations where [the Commission] find[s] that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition.”<sup>40</sup>

### **C. Prior precedent rejecting unbundling of packetized bandwidth of hybrid fiber copper loops, FTTH, and FTTC**

In 2003, the Commission made the sound judgment, based on thorough economic analysis, that ILECs should not be required to unbundle their broadband networks to provide packetized transmission paths over FTTH and hybrid loops.<sup>41</sup> The Commission extended this ruling to FTTC in 2004.<sup>42</sup> The Commission concluded that CLECs would not suffer significant

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<sup>37</sup> Cite to supreme court case find in USTA I

<sup>38</sup> *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) (USTA I).

<sup>39</sup> *Id.*

<sup>40</sup> Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 at ¶ 2 (2005).

<sup>41</sup> See Triennial Review Order, 8 FCC Rcd 16978 (2003).

<sup>42</sup> See Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293, ¶ 9 (2004).

impairment if they did not have such access.<sup>43</sup> Equally important, the Commission made the judgment based upon “an extensive record developed over more than two years” that unbundling would blunt investment in new broadband infrastructure by ILECs and CLECs alike.<sup>44</sup> It would make no sense for a carrier to make the enormous investment necessary in building new broadband infrastructure and endure the accompanying risk, if its competitors were given the ability to share in the fruits of the venture, without any risk.<sup>45</sup>

While the D.C. Circuit vacated parts of the Triennial Review Order, it affirmed the Commission’s view of the anti-competitive effects of unbundling of FTTH and the packetized transmission elements of hybrid loops.<sup>46</sup> The court determined that the Commission reasonably concluded that unbundling of the elements at issue would be “likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments’ potential return.”<sup>47</sup> The court upheld the FCC’s refusal to unbundle the broadband fiber elements, “even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband.”<sup>48</sup> Since that time, both the Commission and the courts have confirmed and built on these principles.

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<sup>43</sup> *Triennial Review Order* at ¶¶ 275-76.

<sup>44</sup> *Id.* at ¶ 272.

<sup>45</sup> *See id.* at ¶ 3.

<sup>46</sup> *See* USTA II, 359 F.3d 554 (D.C. Cir. 2004).

<sup>47</sup> *Id.* at 584.

<sup>48</sup> *Id.* at 585.

**D. Cbeyond has failed to meet its burden of demonstrating substantial impairment.**

Assuming for the sake of argument, that Cbeyond’s petition could be granted under section 251, Cbeyond fails to meet its burden of demonstrating “substantial impairment”.<sup>49</sup> As USTelecom has shown above, intermodal competition in the small business market is increasing significantly each year and is much stronger now than it was when the D.C. Circuit concluded that intermodal competition would compensate for some degree of impairment.<sup>50</sup> Cable is providing vibrant intermodal competition in the small business market.<sup>51</sup> Fixed wireless is growing as an alternative to both wireline and cable and providers of mobile broadband services are also entering the small business market.<sup>52</sup> To suggest that Cbeyond faces the near-monopoly conditions legally necessary to sustain its claim flies in the face of the evidence.<sup>53</sup> Given the fact that there are over 600 facilities-based competitors offering broadband services to small business, Cbeyond cannot show that, absent access to unbundled access to fiber loops, “entry into the market by a reasonably efficient competitor [is] uneconomic.”<sup>54</sup> Given this vibrant

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<sup>49</sup> *Id.*, 359 F.3d at 582.

<sup>50</sup> *Id.* at 585.

<sup>51</sup> *See, e.g.,*

[http://www.pcworld.com/businesscenter/article/146938/options\\_multiply\\_for\\_smallbusiness\\_broadband.html](http://www.pcworld.com/businesscenter/article/146938/options_multiply_for_smallbusiness_broadband.html)

<sup>52</sup> Pat footnote

<sup>53</sup> As Verizon has demonstrated in its comments, according to the Fiber-to-the-Home Council, there are currently 681 facilities-based providers offering fiber broadband service; collectively, these providers serve 1.1 million customers.<sup>36</sup> Competitive LECs are aggressively courting business customers as well—there is an average of six fiber-based broadband providers in each of the fifty largest MSAs, and CLECs have deployed over a hundred thousand route miles of fiber to tens of thousands of office buildings. Those providers have announced ambitious plans to upgrade and expand their networks to bring fiber-based service to even more business customers. Verizon Comments at 11 (internal citations omitted). *See also*, Letter from Christine Varney, Assistant Attorney General, U.S. Department of Justice Antitrust Division, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, at p.28 (filed January 4, 2010 (“stating that in DOJ’s view, “most regions of the United States do not appear to be natural monopolies for broadband service.”)).

<sup>54</sup> 47 C.F.R. § 51/317)(b).

competition, Cbeyond's policy arguments based on meeting putative unanswered needs of small businesses for advanced services must fail.

Looking in particular at competition from cable, it is important to note that cable projects substantial growth in the next few years in the small business market. Cable companies are aggressively marketing its services to small businesses.<sup>55</sup> As USTelecom has demonstrated in Section II above, cable has a sizable and growing share of the small business market and is offering the small business customer precisely the services that Cbeyond argues are not yet available to the small business customer.

ILECs, as Verizon and AT&T have demonstrated, are equally committed to offering the very services to small businesses that Cbeyond asserts they do not now provide and have no interest in providing.<sup>56</sup> The facts belie Cbeyond's broad sweeping generalizations suggesting that the grant of its petition would open a door for small business access to suites of services now available only to large businesses. These services are available to small business customers and they are increasingly subscribing to them.

Given the realities of the small business marketplace, Cbeyond's policy arguments cannot prevail. USTelecom shares Cbeyond's belief that access to advanced Internet services is a driver of job creation by small businesses, which is precisely why continued investment in next-generation infrastructure is so important. But Cbeyond cannot rely on this argument to support its petition, when it has no convincing evidence that the services it wishes to offer are now

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<sup>55</sup> See, e.g., <http://www.twcbc.com/Corporate/BusinessSolutions/SmallBusiness.html> (describing Time-Warner Cable's suite of services for the small business customer including web hosting, security services, DNS, managed storage); <http://business.comcast.com/small/index.aspx> (describing Comcast's offerings focused on the small business customer); :

<sup>56</sup> Cite

unavailable to small businesses. In fact, given that it wishes to use ILEC's facilities to provide these services to small business customers, Cbeyond demonstrates that the underlying facilities are already available to small businesses. The record shows that not only ILECs, but also cable, fixed and mobile wireless and CLECs themselves are offering these advanced services over their own broadband facilities. To grant Cbeyond's petition would not add any more facilities-based competition to small businesses currently out of the reach of these service providers and will in fact discourage them from further build-out. And it makes no sense to impose unbundling obligations on the packetized bandwidth of ILEC's hybrid, FTTH, and FTTC loops when cable, fixed and mobile wireless are also competing directly with ILECs. Such an outcome would further "skew" interplatform competition. There is no valid policy basis to find that unbundling of ILEC facilities is in the public interest without coming to the same (albeit erroneous) conclusion with respect to cable, wireless and competitive wireline facilities.

As the Commission seeks to encourage the private sector to roll out next-generation networks, it makes more sense to ensure that there is parity among all facilities-based providers and that they are all encouraged to compete vigorously to bring services to small business and other customers. Encouraging competition and removing barriers to infrastructure investment, the twin goals of section 706 of the 1996 Telecom Act, on which the Commission relied in making its decision not to require unbundling of fiber loops, would be frustrated if the Commission were to reverse course now and impose this onerous obligation on ILECs alone.

Cbeyond is already competing successfully for small business customers without the relief it seeks. By its own admission, Cbeyond "has been able to achieve substantial market share, up to approximately 15 percent of businesses with between 5 and 250 employees in

mature markets, by offering service exclusively via T-1 loops.”<sup>57</sup> Demonstrably, Cbeyond already has access to unbundled copper and hybrid loops that are more than capable of providing the rate of “between 6 and 10 Mbps” that Cbeyond says it needs to offer “big business” services to its small business customers.<sup>58</sup> Cbeyond’s bald assertion that DS3 loops are “too expensive” (at TELRIC prices) merely confirms that Cbeyond seeks to undercut the market with subsidized prices that will enable it to create its own business strategy based on these discounted rates. But the Commission made clear in the Triennial Review Order that it will not evaluate whether “carriers that pursue a particular business strategy are impaired without access to UNEs.”<sup>59</sup>

**E. Cbeyond has failed to show that the benefits of unbundling would justify the costs and the harm to competition that unbundling would cause**

Cbeyond’s attempts to brush away the detrimental effects of granting its petition are unavailing. Unbundling does not come without real costs.<sup>60</sup> Rather than “eliminat[ing] the need for complex engineering,”<sup>61</sup> Cbeyond’s proposal to “provide packetized broadband service throughout the entire LATA from a *single* point of interconnection with an ILEC” would add significant engineering complexity and other costs.<sup>62</sup> In addition to the costs described by Verizon and the administrative complexities and costs associated with any unbundling obligation, Cbeyond’s Petition adds a further administrative cost and complication – that of

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<sup>57</sup> Cbeyond Petition at 16-17.

<sup>58</sup> Compare Cbeyond Petition at 21 with Comments of AT&T at 21 (stating that the unbundled loops that are already available to Cbeyond give it even *greater capacity*....A DS-3 loop, for example, offers 44.7 Mbps of capacity, which is many times the amount that Cbeyond supposedly needs. Cbeyond also could obtain multiple DS-1 loops at a given location.”).

<sup>59</sup> Triennial Review Order at ¶ 115.

<sup>60</sup> See *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 429 (2002).

<sup>61</sup> Cbeyond Petition at 21-22.

<sup>62</sup> Verizon Comments at 18-20.

monitoring Cbeyond's use of the unbundled loops to ensure that they are used exclusively to provide packetized bandwidth to serve the small business market.

But the biggest cost is the risk of undermining continued investment in next-generation broadband infrastructure. The potential dampening effects of unbundling on investment is even more compelling now than it was at the time of the Commission's Triennial Review Order and the D.C. Circuit's review in USTA II. The economic downturn has made it even more difficult to secure capitol for investments which can only be recovered over the long term. Were the Commission to require unbundling of fiber loops or the type of end-to-end service that Cbeyond actually seeks, investors would be highly skeptical of investing in ILECs next-generation network infrastructure build-out. The expansion of these next-generation fiber networks that is necessary in order to bring the benefits of broadband to all Americans, including small businesses, would be stymied.

#### **IV. The Commission's Decision Not to Require the Unbundling of Hybrid, FTTH or FTTC Loops Facilitated Strong Private Investment and Robust Inter-platform Competition**

Broadband in the United States is a tremendous success story. It has developed with speed and scope unparalleled by any prior network technology. The nation's remarkable progress under the current regulatory framework has resulted in unprecedented broadband deployment and adoption, coupled with increased broadband competition and investment. In particular, a series of decisions<sup>63</sup> by the Commission to not unbundle packet-switching, fiber-to-

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<sup>63</sup> See, e.g., Triennial Review Order, 18 FCC Rcd 16978 at ¶ 3 (2003); Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293, ¶ 9 (2004). Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 at ¶ 2 (2005).

the home, fiber-to-the-curb, and hybrid-fiber loops has facilitated substantial deployment of next generation broadband services by multiple platform providers using a range of technologies. In a relatively short span of time, wireline, fixed and mobile wireless, satellite and cable providers have invested hundreds of billions of dollars to deploy competing broadband networks.

By some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars.<sup>64</sup> The pro-competition and pro-investment environment of recent years has encouraged significant growth in broadband network investment. Private capital investment grew consistently from 2003 through 2008.<sup>65</sup> In 2008 alone, broadband providers invested \$64.2 billion to deploy and upgrade their networks<sup>66</sup> and in 2009 were estimated to invest just under \$60 billion, a temporary reduction in capital spending of less than 10%.<sup>67</sup> This investment level is significant given the severe economic downturn, which led private firms across the economy to reduce investment by approximately 20% as of the third quarter of 2009.<sup>68</sup>

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<sup>64</sup>See, United States Department of Commerce, National Telecommunications and Information Administration (NTIA), *Networked Nation: Broadband in America 2007* (January 2008), pp. 32-34. The NTIA data include payments for wireless spectrum licenses. Wireless, capital expenditures for 2000-2002 were derived by taking the difference of cumulative capital expenditures published by the Federal Communications Commission in its Tenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (FCC-05-173) (Released September 30, 2005), Table 1 at p. 80.

<sup>65</sup>See, *id.*

<sup>66</sup>Yankee Group Research, Inc. © Copyright 1997-2009. All rights reserved. Yankee Group estimates that broadband providers invested \$64.2 billion in 2008, up from \$62.5 billion in 2007. Data are in nominal dollars and include wired and wireless telecommunications carriers and cable providers. Wireless spectrum license payments are not included.

<sup>67</sup>*Id.*

<sup>68</sup>See, United States Department of Commerce, Bureau of Economic Analysis, National Income and Product Accounts Table 5.5.3, "Private Fixed Investment by Type" available at <http://www.bea.gov/national/nipaweb/SelectTable.asp?Selected=N> (visited January 8, 2010). The data indicate that annualized seasonally adjusted *non-residential* private fixed investment for the third quarter of 2009 falling to \$1.355 trillion from \$1.711 trillion in the third quarter of 2008, a decline of -20.9% and average declines for the same figure for the first three quarters of 2009 of -18.4%. The declines for the two major components of non-residential investment, equipment and software and non-residential structures, were -17.8% and -26.2%, respectively, for the third quarter of 2009 and -18.6% and -18.1%, respectively, on average for the first three quarters of 2009.

Moreover, broadband provider investment is projected to return to growth in either 2010 or 2011, sustaining an average of more than \$60 billion per year from 2007 through 2012.<sup>69</sup>

As a result of this massive investment in broadband infrastructure, predominantly from the private sector, mass market consumers, including small and medium businesses, have an unprecedented degree of choice for their broadband communications needs. An overwhelming majority of American consumers and businesses today can choose among *multiple* broadband platform providers. Broad deployment of competing platforms has spurred a dynamic of competitive investment and innovation among networks, applications, content, and devices, providing substantial benefits to consumers, businesses, and the United States economy. Continued investment in more and more powerful broadband networks and related information and communications technologies (ICT) is critical to stimulating technological innovation, economic growth, and productivity and generating millions of high-paying jobs.

The broadband-fueled ICT sector has become a major engine of economic output and growth. ICT contributed \$902 billion in GDP in 2007 – among the top contributing sectors in the U.S. economy and the primary driver of real, inflation-adjusted growth<sup>70</sup> U.S. firms invested \$455 billion in ICT in 2008, representing 22% of total investment across the entire economy. ICT investment and usage have yielded substantial economic benefits, not only among ICT industries, but also throughout the economy. Economists have estimated that at least one-third,

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<sup>69</sup> See, Comments of the United States Telecom Association in the Matter of Comments – NBP Notice # 23 (GN Docket No. 09-47, 09-51, 09-137) at pp. 2-3 (citing market research projections for flat or slightly declining capital investment in 2010, with a return to growth in 2011). See also Communications Daily, Vol. 30, No. 6 (January 11, 2010) at p. 14 (citing a more recent analysis by Catharine Trebnick of Avian Securities projecting a 1.5% increase in capital spending for traditional telecom companies and cable operators in 2010). The \$60 billion average is for 2007-2012 and is based on a March 2009 projection from Yankee Group Research, Inc.

<sup>70</sup> See, Patrick S. Brogan, United States Telecom Association, New York Law School Media Law & Policy, Volume 18, Number II (Spring 2009) at pp. 163-165.

and likely more of productivity growth is attributable to ICT.<sup>71</sup> The impact of productivity is to raise incomes, generate economic growth, and enhance U.S. global competitiveness. ICT also provides at least ten million jobs in its industries and across the economy: As of mid-2008, there were about 5.7 million workers within the ICT industries and an additional 4.5 million ICT-related occupations outside of the ICT sector.<sup>72</sup>

Both within and outside of the ICT sector, the deployment of broadband and broadband-enabled applications creates opportunities for occupations such as network administrators, software engineers, applications developers, and systems designers to produce and implement the technology. In fact, broadband- and ICT-enabled occupations are among the fastest-growing and highest paying jobs in the U.S. economy.<sup>73</sup> From an occupational perspective, the United States Department of Labor projects that network systems and data communications analyst positions will grow 53% from 2008 to 2018, adding 156,000 jobs; computer software engineer (applications) positions will grow 34%, adding 175,000 jobs, and computer software engineers (systems software) positions will growth 30% over ten years, adding 120,000 jobs.<sup>74</sup> From the industry perspective, the Computer Systems Design and Consulting industry will add 656,000

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<sup>71</sup>*Id.* at pp. 176-179.

<sup>72</sup>*Id.* at pp. 175-176.

<sup>73</sup> See, T. Alan Lacey and Benjamin Wright, U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review, Vol. 132, No. 11 (November 2009) at pp. 82-123.

<sup>74</sup> *Id.* at Tables 4 and 5, pp. 91-94. The “fastest growing” data in Table 4 are ranked by percentage growth from 2008-2018. The 53% growth for network systems and data communications analyst positions is second only to biomedical engineering occupations, which are projected to grow 72% during the same period, but will add only 12,000 total jobs. In raw numbers, the greatest growth will be in health care occupations, which is not surprising given population and demographic trends. But the greatest growers in health care, in terms of raw numbers of jobs, are “very low” or “low” paying occupations (e.g., home health aides, personal and home care aides, medical and dental assistants). Among the “high” and “very-high” earning jobs, the networking and computer software jobs add the most in raw numbers.

jobs from 2008-2018, growing from 1.45 million to 2.10 million jobs, about a 45% growth rate over the 10-year period.<sup>75</sup>

Those calling for greater government intervention face a high bar in demonstrating the public interest in reversing a course that has been so successful for consumers, businesses, and the United States economy. We believe it would be a mistake to replace today's bipartisan policy of promoting facilities-based competition with a government-managed program of mandatory unbundling.

#### **A. The United States enjoys a preeminent place with respect to private investment in advanced broadband and ICT infrastructure**

The United States compares favorably to other countries in the area of ICT investment. According to the OECD, the United States ranked first among twenty-one industrialized countries in ICT investment as a percentage of non-residential investment.<sup>76</sup> In other words, the United States led the industrialized world in the portion of total investment allocated to broadband and related information technologies. We can also measure ICT investment as a percentage of total GDP, rather than simply the share of investment. By looking at the share of the overall production of a national economy, we eliminate distortions arising from relative capital intensity. In other words, a country with low investment overall, but with a high portion

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<sup>75</sup> See, Rose A. Woods, U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review, Vol. 132, No. 11 (November 2009) at pp. 52-81. Note: This industry figure cannot simply be added to the occupational numbers cited above, since there is very likely overlap with the occupational growth.

<sup>76</sup> See, Comments of United States Telecom Association in the Matter of Preserving the Open Internet (GN Docket No. 09-191) and Broadband Industry Practices (WC Docket 07-52) (January 14, 2010) at Table 1, page 15 citing OECD Science, Technology and Industry Scoreboard 2009 at section 1.14, ICT investment over the business cycle, available at [http://www.oecdilibrary.org/oecd/sites/sti\\_scoreboard-2009-en/01/14/index.html?contentType=&itemId=/content/serial/20725345](http://www.oecdilibrary.org/oecd/sites/sti_scoreboard-2009-en/01/14/index.html?contentType=&itemId=/content/serial/20725345) (visited January 11, 2010). The analysis lists ICT gross fixed capital formation (GFCF) as a share of nonresidential GFCF for 21 countries. The data are provided in percentages only, not actual investment levels. Ranging from 2004 to 2007, the year for which data are available vary by country.

devoted to ICT, cannot be assumed to allocate a large portion of national income to ICT investment. The OECD has released comparative data on nonresidential gross fixed capital formation for twenty-one countries.<sup>77</sup> The data break out investment in information and communications technology, as well as its components – communications equipment, hardware, and software. The OECD separately publishes country GDP data.<sup>78</sup> The United States shares the number one ranking for total ICT investment as a share of GDP with Australia and Sweden. Overall, the United States compares favorably to other countries when measuring ICT investment, or gross fixed capital formation (GFCF), as a share of total nonresidential GFCF or as a share of gross domestic product (GDP).<sup>79</sup> This means that under the current regulatory environment, network, content, application, and service providers in the United States lead the industrialized world in investing to attain the consumer and economic benefits of the global information economy.

### **B. The United States is a leader in intermodal and intra-modal facilities-based competition for advanced services**

As a result of the massive private investment in broadband infrastructure, the United States now has one of the most competitive broadband markets across one of the largest geographic spans in the world. An overwhelming majority of American consumers and businesses of all sizes today can choose among *multiple* broadband platform providers. In the

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<sup>77</sup> OECD Statistics Directorate, Productivity Statistics, Investment Data and Shares of ICT Investment in GDP and Total Non-residential GFCF (updated September 19, 2008) available at <http://www.oecd.org/dataoecd/27/37/36396989.xls> (visited January 13, 2010). The year of the most current data varies by country.

<sup>78</sup> OECD.Stat Extracts. Gross Domestic Product current prices in national currency, available at <http://stats.oecd.org/index.aspx> (downloaded October 19, 2009).

<sup>79</sup> See, Comments of United States Telecom Association in the Matter of Preserving the Open Internet (GN Docket No. 09-191) and Broadband Industry Practices (WC Docket 07-52) (January 14, 2010) at Table 1, page 15.

mass market, which includes many small and medium sized businesses, cable modem service from a cable incumbent provider or DSL/fiber-to-the-premises from a wireline incumbent is available in at least 90% of the U.S.; and both of these services are available to at least four-fifths of the U.S.<sup>80</sup> Wireline telecommunications firms have been providing business class broadband services to small and medium businesses for nearly two decades.<sup>81</sup> In recent years, cable operators have successfully leveraged their investments in fiber networks to offer broadband services to the small business segment and are now poised to accelerate their entry into the medium-sized business and carrier segments.<sup>82</sup> In addition, dozens of competitive providers of communications to businesses, using both fiber and fixed wireless technologies, offer services to small and medium businesses in their service areas.<sup>83</sup> Finally, more than 95% of the United

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<sup>80</sup>The National Cable and Telecommunications Association states that cable modem service was available to 92% of U.S. households as of September 2009. See <http://www.ncta.com/Statistics.aspx> (visited February 18, 2010). The Commission estimates that, as of the end of December 2008, ADSL was available to 84% of U.S. households. See Federal Communications Commission, High Speed Services for Internet Access: Status as of December 31, 2008 (February 2010) (“FCC High Speed Internet as of December 31, 2008”), at Table 19. Today, ADSL or fiber is likely available to more than 84% of households. While these estimates are for residential end-user premises (i.e., households), businesses—even small and medium sized businesses in less densely populated areas—are generally located in more concentrated geographic areas. Therefore, the portion of small and medium sized businesses located within the serviceable footprints of these two types of broadband providers is likely to be greater than the portion of residential households.

<sup>81</sup> For example, even before xDSL was widely available, telecommunications companies were offering (integrated services digital network (ISDN) services, which were standardized in the U.S. by the early 1990s. See <http://isdn.totalaccess.net/history.html> (visited February 22, 2010).

<sup>82</sup> See, Business Wire, *Fitch News Release: Stiff Competition & Economic Challenges Will Pressure Telecom & Cable Operators in 2010* (December 3, 2009) available at [http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news\\_view&newsId=20091203005599&newsLang=en](http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20091203005599&newsLang=en) (visited February 1, 2010) (stating, “[W]hile overall telecommunications business/commercial service revenue fell in 2009, cable MSOs successfully increased their share of the small business/home office market. Fitch estimates that [cable] commercial service revenue increased by approximately 25% for cable MSOs in 2009 and that this trend will continue with these operators moving up to the mid-size business customer segment in 2010.”).

<sup>83</sup> See, generally, USTelecom, *High Capacity Services: Abundant, Affordable, and Evolving* (“USTelecom High Capacity Fact Report”) (July 2009).

States population can choose from three or more mobile broadband networks, and more than 90% of the population can choose from four or more mobile networks.<sup>84</sup>

The United States compares very favorably to other countries when considering the breadth of platform competition among wireline, cable, and wireless broadband providers. Looking first at platform competition among wired broadband providers, as of mid-2008, cable modem service was available to 92% of households in the United States.<sup>85</sup> The technology with the next highest availability rate in the United States is DSL, which was available to 84% of households.<sup>86</sup> In the European Union, while DSL was available to 92.5% of households as of year-end 2007,<sup>87</sup> cable modem, the technology with the next highest availability rate in the European Union, was available to only 40% of households at this time – 53% availability in

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<sup>84</sup> See, Michael J. Copps, Acting Chairman, Federal Communications Commission, Bridging Broadband to Rural America (May 22, 2009) at p. 12 and Thirteenth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC DA 09-54 at p. 6 (rel. January 16, 2009). Wireless broadband providers are planning to upgrade existing third generation mobile broadband networks to higher-speed fourth generation technologies. Verizon and AT&T plan to deploy Long Term Evolution (LTE) technology over the next several years. See <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30358&mapcode> (visited January 8, 2010) and <http://investor.verizon.com/news/view.aspx?NewsID=1028> (visited January 8, 2010). Clearwire, which was recently spun off from Sprint, projects that its fourth generation wireless broadband services using new mobile WiMAX technology will be available to 120 million people by 2010.<sup>84</sup> See Clearwire Corporation, United States Securities and Exchange Commission Form 10-K (filed March 26, 2009), at pp. 2-3.

<sup>85</sup> See, FCC High-Speed Internet as of December 31, 2008 at Table 19 (stating that cable modem service is available to 96% of residential end-user premises to which cable systems can provide cable television service). Cable television is not available to all households. Therefore, for an estimate of availability to all households, see National Cable & Telecommunications Association at <http://www.ncta.com/StatsGroup/Availability.aspx> (visited February 18, 2010) (asserting that cable high-speed Internet availability to households in the United States is 92%).

<sup>86</sup> See, FCC High-Speed Internet as of December 31, 2008 at Table 19 (stating that DSL service is available to 84% of residential end-user premises to which ILECs offer local telephone service). This is an estimate of the percentage of residential end-user premises with broadband availability, not the percentage of zip codes in which DSL is available.

<sup>87</sup> See, Commission of the European Communities, Progress Report on the Single European Electronic Communications Market (14<sup>th</sup> Report), Commission Staff Working Document, Volume 1, Part 2, document SEC(2009) 376/2 (“European Commission Staff Working Document”) (July 30, 2009) at p. 23. Union-wide and nationwide availability are computed by adding together the reported rural availability rate and the reported rural gap with national coverage.

urban areas and only 4% availability in rural areas.<sup>88</sup> As discussed above, for cable modem and wireline broadband, a greater portion of businesses is likely to be located within the service footprints of these technologies than residential end-user premises since businesses are located in more geographically concentrated areas.

The relative portion of cable modem and DSL subscribers that rely on these two mass market wired platforms further illustrates the relative competitive balance among broadband platforms in the United States compared to the European Union. In the United States, as of year-end 2008, 54% of fixed broadband subscribers used cable modem and 43% used DSL or fiber.<sup>89</sup> In the European Union, as of year-end 2008, 81% of subscribers used DSL or fiber and only 15% used cable modem.<sup>90</sup>

Japan and South Korea have been recognized for their deployment of fiber. However, the deployment of alternative platform competition, particularly cable modem, has developed differently in both countries. It appears that Japan has a relatively weak cable modem presence, while the South Korean cable broadband industry appears to be more developed.<sup>91</sup> As of year-

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<sup>88</sup> See, *id.* at pp. 22-23. The most current availability data for the European Union are for year-end 2007. For practical comparison purposes, the data for availability in the United States for year-end 2007 are similar to mid-year 2008. See Federal Communications Commission, High-Speed Services for Internet Access: Status as of December 31, 2007 (January 2009) at p. 3 and Table 14 (stating that cable modem service is available to 96% of residential end-user premises to which cable systems can provide cable television service and DSL is available to 82% of residential end-user premises to which ILECs offer local telephone service). There is, of course, variation within Europe, with high cable availability in a handful of countries, e.g., the Netherlands (92%), Belgium (88%), Portugal (85%), Hungary (73%), and Luxembourg (71%). Nonetheless, cable availability remains low for the European Union as a whole (40%) and for some of the largest member countries, e.g., France (26%), Germany (47%), Spain (51%), and the UK (48%).

<sup>89</sup> See, FCC High-Speed Internet as of December 31, 2008 at Table 1 (Total broadband subscribers with 200 kilobits per second in at least one direction is 67.6 million. This statistic excludes 25.1 million mobile broadband subscribers for comparison with the European Union data, which also exclude mobile wireless. DSL and fiber subscribers were 34.0 million. Cable modem subscribers were 41.5 million.).

<sup>90</sup> See, European Commission Staff Working Document at p. 18.

<sup>91</sup> See, Robert Atkinson, Daniel Correa, and Julie Hedlund, The Information Technology and Innovation Foundation, Explaining International Broadband (May 2008) at D2 (“Japan’s cable TV industry is highly fragmented, which

end 2008, 86% of Japanese broadband subscribers used fiber or DSL and 14% used cable modem, while in South Korea 67% of broadband subscribers used fiber or DSL and 33% used cable modem.<sup>92</sup>

For wireless broadband, the migration from third to fourth generation mobile broadband wireless in the United States is occurring in one of the most structurally competitive wireless markets in the world. As noted above, more than 95% of the United States population has a choice of three or more mobile networks, and more than 90% of the population has a choice of four or more mobile networks.<sup>93</sup> As of the end of 2008, the top four mobile carriers in the United States had a market share of 90.4 of subscribers and the largest had a share of 31.6%. In a comparative study, in 23 of 26 OECD countries, which include the United States, the top four carriers had 100% of the market; in 13 of the 26 OECD countries, the top three carriers have 100% of the market.<sup>94</sup> Furthermore, according to the European Commission staff, “the deployment of mobile/wireless networks in the EU is uneven. Even in the case of UMTS networks (where coverage ranges from 30% in the case of Estonia to 90% in the case of

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makes it difficult for providers to upgrade their networks for two-way (broadband) service.”) and F3 (describing the history of the South Korean cable modem industry).

<sup>92</sup> See, Organisation for Economic Cooperation and Development (OECD) Broadband Statistics (December 2008) at Table 1d available at <http://www.oecd.org/dataoecd/21/35/39574709.xls> (visited September 2, 2009).

<sup>93</sup> See, Thirteenth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC DA 09-54 at p. 6 (rel. January 16, 2009).

<sup>94</sup> Letter of Christopher Guttman-McCabe, CTIA – The Wireless Association, to Marlene Dortch, FCC (May 12, 2009) at p. 6, available at [http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520216419](http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520216419) (visited September 2, 2009). The letter listed the following market shares as of the fourth quarter of 2008 for U.S. providers: 28.5% (AT&T), 26.7% (Verizon), 18.2% (Sprint), 12.1% (T-Mobile), and 14.5% (Other). We shifted 4.9% share to Verizon to adjust for the Alltel acquisition in January 2009, moving Verizon to the lead at 31.6% and reducing Other market share to 9.6%. Verizon Wireless gained 13.2 million *net* subscribers from Alltel (Verizon, *Investor Quarterly Q1 2009* (April 27, 2009) at pp. 4-5), representing 4.9% of 270.3 million wireless subscribers (CTIA, *Semiannual Wireless Industry Survey*, available at [http://files.ctia.org/pdf/CTIA\\_Survey\\_Midyear\\_2009\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Midyear_2009_Graphics.pdf) (visited February 22, 2010)).

Denmark, Luxembourg and the United Kingdom), coverage does not yet compare to DSL, which has an average of 90% population coverage in most countries.”<sup>95</sup>

The wide availability of multiple platforms in the United States is significant for several reasons. First, it creates broad-based, sustainable competitive incentives to upgrade networks to increasingly powerful technologies, such as the wireline deployment of fiber and Ethernet services, the cable industry deployment of DOCSIS 3.0 and Ethernet services, and wireless network deployments of WiMAX, LTE, and other fixed microwave services. Third, competition among network platforms creates strong incentives to fill networks with content and applications that consumers and businesses want and provides a competitive check against network providers limiting access to particular applications.<sup>96</sup> Third, the availability of multiple powerful broadband networks has enabled customer choice based on competition—not only across network platforms, but among networks, applications, and equipment and device providers. As we have discussed in Section II, there are many choices that are available to small and medium businesses in the United States from competing facilities-based broadband networks.

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<sup>95</sup> See, European Commission Staff Working Document at p. 24.

<sup>96</sup> See, e.g., FTC Staff Report, *Broadband Connectivity Competition Policy*, June, 2007 at p. 157 (*FTC Broadband Report*).

**V. The Overwhelming Weight of the Evidence Demonstrates that Private Investment and Intermodal Competition are the Drivers of Next-Generation Networks and that Unbundling Retards This Deployment.**

**A. Cbeyond’s reliance on the Berkman Center study is misplaced because the Berkman Center Study analyzes first generation broadband networks, relies on one flawed study, and ignores the vast body of economic literature finding a negative correlation between unbundling and next-generation network build-out**

Cbeyond’s reliance on the Berkman Center Study (the Berkman Study) as support for its petition is misplaced.<sup>97</sup> As many commenters including the major European associations representing cable and wireline operators have ably demonstrated in their comments on the Berkman Study, private investment, not unbundling, is driving the build-out of next-generation networks and the Berkman Study seriously mistakes the evidence respecting unbundling.<sup>98</sup> In fact, the Berkman Study focuses primarily on first generation broadband networks. As USTelecom explained in its comments, “the Berkman Study characterizes unbundling as having played a significant role in the transition from dial-up connectivity to first-generation broadband, but then assumes without explaining how unbundling can or will spur investment in next

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<sup>97</sup> Berkman Center for Internet & Society at Harvard University, *Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world* (Oct. 2009) (“*Berkman Study*”), available at [http://www.fcc.gov/stage/pdf/Berkman\\_Center\\_Broadband\\_Study\\_13Oct09.pdf](http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf).

<sup>98</sup> Letter from Michael Bartholomew, Director, The European Telecommunications Network Operators’ Association (ETNO) to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47 et al. at 5 (filed Dec. 3, 2009) (describing significant errors in Berkman Study facts about broadband deployment in various European countries and noting: “To the extent that the investment in next generation access networks is qualitatively different from upgrading the current infrastructure of incumbents, ETNO believes that it is not appropriate to attempt to draw conclusions and formulate policy advice from the first generation world to the next-generation one. It should be noted that as of July 1, 2009, FTTH deployment (i.e., homes passed not subscriptions) in the European Union represented only 1.75% of total lines.”); Letter from Gilone d’Udekem, Director Regulatory Affairs, Cable Europe to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47 et al. (filed Dec.23, 2009) (Demonstrating that intermodal competition, not unbundling drives next-generation networks: “It is the existence of at least one challenger network, mainly cable, which has driven investments in broadband innovation leading to higher speeds and higher broadband coverage. By contrast facilities-based competition based on open access regulation is generally viewed as leading to lower retail prices but only in the short term and plays only a minor role in investment upgrade decisions by the incumbent in comparison with infrastructure competition.”).

generation fiber networks. In reality, such networks require enormous private investment, which unbundling regulation would only undermine.”<sup>99</sup>

This is backed up by sound empirical research. For example, a March 2009 economic analysis, which the Berkman Study inexplicably did not review, found “a negative relationship between unbundling and investment in next-generation networks.”<sup>100</sup> The same study also found “a positive relationship between platform competition and investment in next-generation networks.”<sup>101</sup> Indeed, incumbent telecommunications carriers invested in FTTH networks to compete with cable broadband providers only after the FCC eliminated most unbundling requirements.<sup>102</sup> The economic literature suggests that unbundling is primarily aimed at enhancing intra-platform “competition,” and it would not spur investment in next generation networks, and the Berkman Study does not claim, let alone establish, otherwise.

The vast majority of the countries on which the Berkman Study focuses are achieving the speeds reported in the Berkman Study using primarily DSL. For example, the Berkman Study recognizes that “fiber has been slower to deploy in the Netherlands than in some other countries,” but attributes this to “the ability of the cable and copper infrastructure to be stretched to support higher speeds” rather than to any lack of incentive to invest in fiber resulting from

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<sup>99</sup> See Comments of the United States Telecom Association on Study by the Berkman Center for Internet and Society, GN Docket Nos. 09-47 et al. (filed Nov. 16, 2009) (USTelecom Comments) at 7.

<sup>100</sup> Scott Wallsten and Stephanie Hausladen, *Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks*, Review of Network Economics 8(1), 90-112 (March 2009); see also Comments of Thomas M. Lenard, Ph.D., President and Senior Fellow Technology Policy Institute on Broadband Study Conducted by the Berkman Center for Internet and Society, GN Docket Nos. 09-47, 09-51, 09-137 (filed Nov. 9, 2009) (“Lenard Comments”).

<sup>101</sup> Scott Wallsten and Stephanie Hausladen, *Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks*, Review of Network Economics 8(1), 90-112 (March 2009).

<sup>102</sup> Thomas W. Hazlett and Anil Calistan, “Natural Experiments in U.S. Broadband Regulation,” at 15 (George Mason University School of Law, February 2008).

unbundling requirements.<sup>103</sup> The Berkman Study also brushes off the lack of fiber investment in France. Although France is touted as having successfully spurred broadband through unbundling, “fiber-based broadband connections remain marginal in France,” and DSL subscriptions make up 95% of all broadband connections there.<sup>104</sup> Similarly, the United Kingdom does not have fiber or very high speed DSL to speak of, with only its sole major cable provider offering very high speed service at 50 Mbps.<sup>105</sup> In this respect, the benchmarks used by the Berkman Study are very poor predictors of next generation network build-out.

The Berkman Study acknowledges that the majority of econometric studies analyzing the effect of unbundling on broadband penetration dispute its conclusions.<sup>106</sup> The econometric studies cited all show either no effect of unbundling on broadband penetration, negative effects, inconsistent effects, or an effect less than (or together with) platform competition.<sup>107</sup> The Berkman Study ignores an extensive literature, providing only brief mention of one of the important studies by Wallsten.<sup>108</sup> But Wallsten’s survey of the existing literature reaches the opposite conclusion of the Berkman Study, which should have addressed some of the evidence on which the Wallsten article relies.<sup>109</sup> The Wallsten article cites an extensive literature in its bibliography which the Berkman Study mentions only in passing or not at all. Thus, the

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<sup>103</sup> Berkman Study at 207.

<sup>104</sup> *Id.* at 183.

<sup>105</sup> *Id.* at 102.

<sup>106</sup> *Id.* at 115.

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., Scott Wallsten, *Broadband and Unbundling Regulations in OECD Countries*,” AEI-Brookings Joint Center Working Paper (2006), cited in Berkman Study, n.85.

<sup>109</sup> For example, Wallsten concludes that “the empirical economics research demonstrates that network sharing, or unbundling, rules reduce incentives to invest and thus can slow growth of broadband networks.” Scott Wallsten, *Towards Effective U.S. Broadband Policies* (2007), available at <http://www.pff.org/issues-pubs/pops/pop14.7usbroadbandpolicy.pdf>; see also Edmond Baranes and Marc Bourreau, *An Economist’s Guide to Local Loop Unbundling*, 57 *Comms. & Strategies* 13 (1st quarter 2005) (also providing a review of the literature and making similar findings), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=977380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977380).

Berkman Study has utterly failed to comply with the Commission's charge to provide an expert survey of the existing literature.

**B. The ETI Study, "Regulation, Investment and Jobs, How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs" Is Deeply Flawed**

Recently, Cbeyond and others filed in this docket a study by ETI purporting to show that wireline companies have "disinvested" in their networks during the period 2002-2007 *as a result of* policies that limited unbundled access and, conversely, that wireline companies had increased their capital investment during the period 1996-2001 *as a result of* unbundling regulation. There are serious problems with this conclusion, both conceptual and methodological.

Perhaps the most problematic aspect of the study is conceptual: the notion that wireline broadband providers are "disinvesting" in their networks, despite spending nearly \$60 billion annually on their networks. Taken on its face, this means that wireline broadband providers are not investing sufficiently to compensate for wear and tear on existing assets such that the *net* quality of their networks is deteriorating. Stepping back for a moment, this concept simply flies in the face of the most obvious facts:

- U.S. household broadband penetration has risen from zero to at least 60%.<sup>110</sup>
- Mobile network customers grew from 128,000 to 276,000 from 2001 to mid 2009<sup>111</sup> and customers are beginning to consume an exploding amount of bandwidth due to the increasing adoption of 3G and 4G services (and much of this traffic, after leaving the cell tower, is carried over wireline transport networks).

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<sup>110</sup> See FCC High-Speed Internet as of December 31, 2008 at Table 21.

<sup>111</sup> See CTIA, *Semiannual Wireless Industry Survey* available at [http://files.ctia.org/pdf/CTIA\\_Survey\\_Midyear\\_2009\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Midyear_2009_Graphics.pdf) (visited February 22, 2010).

- There has been massive growth in number, complexity, and bandwidth intensity of applications. For example, U.S. Internet video traffic in 2006 (only 8% of all traffic in 2006) consumed more bandwidth than the entire U.S. Internet in the year 2000.<sup>112</sup> The U.S. Internet backbone carried approximately 25 petabytes per month in 2000<sup>113</sup> and was estimated to carry 2,442 petabytes per month in 2008<sup>114</sup> – in other words bandwidth consumption grew by a factor of nearly ten.
- All of this growth has been facilitated by an explosion of investment in increasingly powerful competing broadband access platforms (cable, telco, and wireless). Networks must make related investments in long-haul and metropolitan transport to accommodate the massive growth in overall bandwidth consumption.

We ask (rhetorically): how it is *possible* that networks have “disinvested” since 2001 while accommodating the explosive growth in broadband connections, usage, and traffic since then and providing an Internet customer experience that is so clearly superior to the Internet customer experience of, say, 2001?

In addition to this major conceptual problem, there are several methodological problems with this study. The first is a problem of measurement. In particular, the study measures investment over time using “net book value,” simply netting out accounting depreciation from

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<sup>112</sup> Cisco Systems, Inc. *The Exabyte Era* (2007) at p. 9.

<sup>113</sup> *Id.*

<sup>114</sup> Cisco Systems, Inc. *Visual Networking Index* (2009). Cisco publishes projected global IP traffic data and forecasts from 2008-2013 for the various regions of the world and selected countries. Selected country data are available from Cisco VNI Forecast Widget for the Cisco Visual Networking Index IP Traffic Forecast, 2009 at [http://www.ciscovni.com/vni\\_forecast/index.htm](http://www.ciscovni.com/vni_forecast/index.htm) (visited January 11, 2010). The 2.4 exabytes for 2009 includes all consumer and business Internet traffic, excluding private IP WAN traffic.

gross investment—both as recorded in the FCC’s ARMIS database.<sup>115</sup> As an initial matter, accounting depreciation bears no relation to economic depreciation or asset values and net book value is a meaningless metric for the purpose of measuring investment incentives over time. Moreover, ETI looks purely at *nominal* investment data, without even a mention that an investment dollar many years ago does not buy nearly as much power, performance, and efficiency as an investment dollar today. Nominal data are easier to work with than inflation-adjusted data because, e.g., it is difficult to choose an appropriate price deflator for network equipment whose productivity growth is based on such factors as semiconductor processing power and wave division multiplexing. But here the use of nominal data causes significant distortions: a dollar in 1996 is treated the same as a dollar in 2001, which is treated the same as a dollar in 2007. Even worse, ARMIS does not capture all of the investments made by wireline providers, especially the increasing portion of investment that is allocated to broadband. So, the study draws conclusions about investment based on a metric that does not fully reflect investment in the broadband networks to which the vast majority of customers have either migrated or are migrating over time.

The next methodological problem involves the attempt to break out business and residential investment. Here the study mixes and matches sources for investment data (financial/press reports and ARMIS) to back out business investment, which is highly problematic. Second, as if the apples-oranges patchwork of sources weren't enough of a

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<sup>115</sup> Susan Gately, Helen Golding, Lee Selwyn, and Colin Weir, Economics and Technology, Inc., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs* (February 2010) at p. 7-8. "Network disinvestment occurs when the depreciation charge in any given year is greater than the amount of new capital investment. The combined net book value of telecom plant for the companies that now are part of AT&T, Qwest and Verizon rose from \$142-billion in 1996 to \$155-billion in 2001, but by 2007 it had dropped by a third, to \$101-billion."

problem, the study does not even acknowledge that there is a joint-use allocation problem (i.e., that many investments are jointly used for both business and residential services). Third, even if there were accurate data showing that mass market broadband access took an increasing share of wireline incumbent providers' investments in recent years relative to large enterprise and transport, it would not necessarily follow that that it was the result of regulatory policy shifts, a failure to build out necessary infrastructure to meet demand. For example, an alternative hypothesis would be that given the extraordinary level of investment in transport and enterprise networks in the late 1990s along with the resulting impact on capacity and asset prices, the investment need (relative capacity) and cost (relative pricing) to build out mass market access was greater in the latter period. Without examining this alternative hypothesis, attributing a relative shift in investment focus to regulatory policies is highly speculative.

A third methodological problem is causation. The study does not consider explanatory variables other than regulatory unbundling to explain investment. While the study makes fleeting mention of "macroeconomic factors" leading to the decline *after* the tech-telecom bubble, it does not consider the most salient factors driving extraordinary growth *during* the bubble period, which includes most or all of their "competition friendly" period of 96-01. In other words, the study treats the telecom bubble period as if it were a normal baseline against which we can judge subsequent periods, when in reality the growth in capital investment that occurred during that period was driven by a convergence of multiple *extraordinary* factors. On one hand, there was an extraordinarily aggressive government policy effort to foster a "competitive local exchange carrier" industry through unbundling policies. On the other hand, there was extraordinarily friendly macroeconomic investment climate that attracted vast amounts of capital to the telecommunications and technology industries: favorable fiscal, monetary,

financial, and geopolitical climates; low capital costs; wide availability of junk financing; a Telecom Act that had not been fully tested in court; a significant build-out of technology and telecommunications infrastructure *combined with* investment hype including misinformation about Internet growth. Without all of these factors, a telecommunications investment boom of the magnitude that we saw in the late 1990s, as well as the extraordinary level of competitive entry we saw, would not have occurred. In the end, the speculative investment bubble resulted in destruction of at least hundreds of billions of dollars in market value. We also were left with significant excess capacity, especially in fiber transport networks, while significant investment needs remained in the area of mass market broadband access, where competing wireline, cable, and wireless providers have focused much of their efforts in recent years.

Policy makers cannot give serious consideration to conclusions based on the faulty concept of “disinvestment” and faulty regulatory accounting data. Furthermore, policy makers cannot give serious consideration to conclusions based on comparing investment in 1996-2001 to any other time period without any attempt to control for relevant external factors. Most perniciously, the ETI study recommends reinstating the unbundling policies of the late 1990s because “the economic gains in terms of investment, employment, innovation, and national competitiveness that will flow from a reinstatement...should be beyond dispute.” (p. 36). Yet, no policy maker could take seriously a claim that a return to unbundling policies would yield such economic benefits without simultaneously assuming a return to the extraordinarily investment-friendly macroeconomic, financial, and geopolitical climates of the late 1990s.

## **VI. Conclusion**

It makes no policy, legal, or economic sense to grant the Cbeyond Petition. Even if the relief that Cbeyond seeks were cognizable under section 251 of the Act, and it is not, Cbeyond has failed to make its case. The Commission cannot walk away from six-years of settled precedent without significant evidence of change in the competitive landscape that requires a different legal and policy outcome. But Cbeyond's argument rests on a few highly flawed studies that are disproven by the great weight of serious academic studies and reliable statistical evidence. Given the strong and growing intermodal competition in the small business market, Cbeyond cannot show that it is significantly impaired or point to a real benefit that could conceivably outweigh the cost of deterring facilities-based competition and imperiling the private investment necessary to bring advanced communications networks to all Americans. Most importantly, even if, in the face of the overwhelming evidence to the contrary, the Commission were to make the policy judgment that the grant of the Cbeyond Petition would benefit small businesses, it would still make no policy, economic, or legal sense to limit such rules to incumbent LECs. The facilities at issue in this request are new investment, broadband facilities providing information services, and incumbent LECs have no inherent advantage in the deployment of such facilities. Thus, any requirements imposed by the Commission along the lines advocated by Cbeyond should apply equally to all broadband providers, including cable, fixed wireless and competitive LECs.

Respectfully submitted,

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