Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF CENTURYLINK

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I. INTRODUCTION AND SUMMARY

Perhaps a dozen parties submitted comments on CBeyond's Petition.[1] Major telephone carriers, including AT&T, Qwest, and Verizon, opposed the Petition, as did ITTA, the association representing midsized incumbent local exchange carriers ("ILECs"). Corning, the Telecommunications Industry Association and the Fiber to the Home Council also opposed. Covad, COMPTEL, a handful of competitive local exchange carriers ("CLECs ") supported the Petition.[2]

As a whole, the Petition and comments show a record plainly insufficient to justify reversing the Commission's long-standing decision on fiber and hybrid fiber-

[1] 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 (filed Nov. 16, 2009) ("Petition"). Comments were filed on January 22, 2010. *See* Public Notice, DA 09-2591 (rel. Dec. 14, 2009).

[2] The SBA Office of Advocacy also submitted a short letter, suggesting that granting the Petition "may" be of benefit to small businesses. SBA at 2.

copper loop unbundling. Cbeyond's handful of supporters fails to acknowledge how very broad the Petition's demands are. They ignore how the Petition would undermine fiber loop investment, especially in lower-density areas. They overlook how the Petition's pricing scheme and transport demands show that it is unreasonable.

Opponents of the Petition showed that the Commission's existing policy has led to heavy investment in fiber networks, promoting competition, benefiting consumers, and promoting the statutory goals. They showed that contrary to CLEC claims, ILECs are offering a broad and growing array of services tailored to small business customers. The record provides no legal basis for departing from the Commission's established policy on fiber and hybrid loops. The Petition offers insufficient evidence to reverse Commission findings, and it ignores the statutory standards for unbundling. Reversing the Commission's settled unbundling policy also would raise serious legal concerns.

For all those reasons, the Petition must be denied.

II. THE PETITION WOULD HARM FIBER INVESTMENT.

A. The scope of the Petition is far broader than Cbeyond or the CLECs acknowledge.

Cbeyond and its several supporters ignore what a radical policy departure the Petition is seeking. The Commission must recognize, however, the extraordinarily broad scope of the preferences that Cbeyond is requesting here.

The Petition seeks a stark reversal in Commission policy toward fiber loop investment. It asks the Commission to overturn long-settled impairment conclusions

about fiber and hybrid fiber/copper loop unbundling in the *Triennial Review Order*.[3] It asks the Commission to reverse, and to disregard, its prior findings -- which were expressly upheld on appeal -- about the legal standards for section 251(c) unbundling, CLECs' lack of impairment without access to fiber and hybrid loops, and the effects of mandatory unbundling on fiber loop investment. CenturyLink joins the many other parties that oppose those demands.

The Petition actually seeks much more than just access to unbundled loops. It seeks access to "an entirely new (yet vaguely defined) end-to-end service that would enable Cbeyond, with minimal investment, to use [ILECs'] fiber network at very low (yet vaguely defined) rates."[4] Cbeyond seeks "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."[5]

This "bitstream transmission path" includes more than just a loop; it incorporates the entire fiber network, including loops, packet switching, and transport.[6] Cbeyond

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[3] 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*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004)("*USTA II*").

[4] AT&T at 16.

[5] Petition at 21-22.

[6] The Commission defined a loop 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." 47 C.F.R. § 51.319(a). Cbeyond wants all

wants ILECs to create a service that "does not exist."[7] Cbeyond wants free transport (or at least unbundled transport) to a single "aggregation point" in the LATA -- and this where the Commission has expressly found CLECs are unimpaired. It wants elimination of the requirement for collocation for access to unbundled network elements ("UNEs"). It wants exemption from the requirement that they have a telephone number to secure enhanced extended links ("EELs"). It evidently also wants access to unbundled packet switching, again despite a lack of impairment. Although it claims costs would be "minimal," its proposed pricing regime for fiber and hybrid loops would give CLECs access to fiber loops below market cost everywhere, and far below cost in low-density areas.

Throughout its remarkable demands, the Petition is inconsistent with the statute and thoroughly unrealistic. Section 251(c) does not empower the Commission to entertain the broad scope of unbundling that the Petition seeks.[8]

B. The petition's demands would undermine fiber loop investment, especially in lower density areas.

AT&T, Qwest, Verizon, and TIA/FTTHC each showed that such demands would certainly undermine fiber loop investment.[9] The Petition would give CLEC competitors

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elements of a "bitstream transmission path" from any end-user premises to a single interconnection point within the LATA.

[7] Verizon at 19.

[8] 47 U.S.C. § 251(c).

[9] *See* AT&T at 20-25; Corning at 11-14; Qwest at 22-25; Verizon at 17-24.

access to ILEC investment in next generation network without sharing the risk of that investment.[10] Imposing a below market price ceiling (in many cases, a below cost pricing ceiling) on fiber loops and forcing ILECs to provide transport (and at the ILECs' expense) to serve Cbeyond's choice of business model simply "cannot support scrutiny."[11] The Commission found, and the D.C. Circuit affirmed, that unbundling can only "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."[12]

> 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.[13]

The investment required for fiber loops is indeed "enormous."[14] It is uncertain whether any particular fiber loop investments made to date will ever provide a reasonable return. Some in the investment community continue to challenge the wisdom of Verizon's commitment to fiber to the home in its ongoing FiOS deployment, and other question AT&T's U-Verse fiber-to-the-node technology. Certainly, there are analysts

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[10] *E.g.,* ITTA at 8.

[11] *Id.* at 9.

[12] *Triennial Review Order* at ¶ 3.

[13] *Id.*

[14] *See* TIA/FTTH-C at 7-9 (cataloguing the magnitude of investment by broadband providers, particularly industry leaders Verizon and AT&T).

who would prefer ILECs to harvest their existing networks, rather than invest heavily in costly and uncertain fiber and hybrid loop deployment in a difficult economic environment.

The Petition would have particularly damaging effects on investment incentives in lower density areas. Low density areas already face especially difficult economics for fiber investment. Despite this, ILECs -- including CenturyLink -- have been extending fiber network into lower density areas in an effort to provide next generation broadband services. A major goal of the upcoming National Broadband Plan is understood to be promoting broadband investment and deployment in low density areas. The Petition, however, would render marginal areas wholly uneconomic for investment because of the risks and costs imposed. Cbeyond's supporters ignore the problems of lower density service areas.

C. The Petition's pricing scheme and transport demands show it is untenable.

Cbeyond effectively recognizes that unbundling at TELRIC pricing discourages fiber investment. To make a weak petition more palatable, Cbeyond proposed that the Commission adopt an entirely new pricing system for unbundled fiber loops. Instead of using the statutory TELRIC standard, the Petition argued, the Commission should decree that fiber loops will be priced at the lowest residential "retail" rate in the Metropolitan

Statistical Area. This different pricing scheme, Cbeyond suggested, would allow ILECs a better "profit" on their fiber loop investment.[15]

CLEC commenters did not endorse Cbeyond's claim that this pricing regime helps justify the Petition. Some parties were silent on the issue.[16] Others endorsed the unbundling but insist that TELRIC pricing must apply.[17] The Petition represents a bad and unjustifiable policy either way. Proposing to pay a "retail" rate "would not alleviate disincentives to investment."[18] The true effect of Cbeyond's proposal is gaining "access to fiber loops at a *lower* price than it could obtain through arms-length negotiations in the marketplace" for the same location.[19]

Cbeyond's pricing system actually makes the fiber loop unbundling even more damaging to investment than it first appears. The CLECs fail to note that ILECs have geographically averaged retail pricing. Even when not mandated by state regulators, marketing realities require it. Consequently, Cbeyond's policy would force ILECs to provide unbundled fiber loops in many high-cost areas within an MSA at pricing *below* TELRIC. ILECs could alleviate this problem only by raising their lowest residential rates throughout their markets. That response would not help consumers, and it would undermine competition by handicapping ILECs' ability to compete in the

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[15] *E.g.,* Petition at 21.

[16] COMPTEL and Integra, for example, did not address this issue.

[17] Covad at 17-18; XO at 9-11.

[18] Verizon at 24.

[19] *Id.* at 24-25.

telecommunications and broadband services market. Effectively, the Petition would force sale of UNEs in individual locations below TELRIC. Cbeyond's pricing scheme underscores just how arbitrary and unsustainable a grant of the Petition would be.

Fiber loops are expensive everywhere, but the investment decisions are especially difficult when for carriers deploying fiber in lower-density areas. CenturyLink estimates that, at the lowest residential rate, it would take 18 years to recover just the up-front investment for the average fiber loop. When you factor in maintenance, transport to the tandem, and the time value of money, it is clear that fiber loop unbundling would have a devastating impact on investment. That impact would be especially bad for carriers investing in more rural areas. "The petition seems to recognize that fiber investment is inherently expensive and carries great economic risk," but the CLECs want to outsource all financial risk to the ILEC, while forcing ILECs into a more than 20 year investment payback on capital investments.[20]

The CLECs also ignore other costs associated with Cbeyond's broad request. Among them is the cost impact of transport. The Petition wants ILECs to provide dedicated transport (at the ILECs' cost) to a single aggregation point per LATA.[21] This is no small cost anywhere, but in many MSAs and many LATAs the cost of transport is considerable. There is no justification for shifting this cost to an ILEC from a competitor.

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[20] *E.g.,* ITTA at 9.

[21] Petition at 21-22.

The Commission cannot order ILECs to offer UNEs below cost. Unquestionably, granting the Petition would damage incentives to invest in fiber loops in rural and higher-cost areas -- areas most in need of fiber investment, and where that investment is already the most difficult to justify. The Petition would seriously undermine the primary goal of Section 706 of the Act:[22] "more investment in next generation networks."[23]

D. The Commission's policy has promoted heavy investment in fiber networks.

Under the current policy, fiber and hybrid loop investment has "skyrocketed."[24] ILECs have invested heavily in fiber facilities.[25] Overall broadband industry investment has grown dramatically and continues at an aggressive rate. Already 27 million households have access to fiber, and CLECs have fiber to 1.1 million customers.[26] By any measure, the Commission's policy has succeeded; "[t]he Commission's predictive judgment has been borne out."[27] The Commission's policy has been a success. That policy serves today to continue deployment of fiber and hybrid loops, investment that otherwise would be increasingly difficult to justify.

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[22] 47 U.S.C. § 157 nt.

[23] Corning at 11.

[24] TIA/FTTH-C at 7.

[25] *See* U.S. Telecom, *High-Capacity Services: Abundant, Affordable, and Evolving* (July 2009) (http://ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf).

[26] AT&T at 9; Verizon at 20.

[27] Qwest at 7.

Despite its largely rural footprint, CenturyLink has also been investing vigorously. CenturyLink increased broadband capable loops from less than 60% in 2001 to 84% in 2007, and it has committed to reach 90% by 2012. Before merging with CenturyTel in 2009, Embarq alone had already increased DSL spending by nearly 500% between 2001 and 2007. CenturyLink continues to deploy fiber deeper and deeper into its network.

The extent of ILEC investment is particularly striking, when one considers that ILECs have been facing continuing line loss and significant annual revenue declines throughout this period. ILECs nationwide have been losing lines, and at a rate of 6 to 9% annually. Toll minutes of use on their networks have been declining, as well. The CLECs assume ILEC fiber loop investment will not decline with mandatory unbundling. In the present economic climate, however, with credit and capital markets tight, with market capitalizations still down, and with ILECs facing declining revenues, it is unrealistic to pretend that the Petition would not discourage fiber loop investment.

E. Claims that ILECs are ignoring small business are false.

Cbeyond contends ILECs are not offering services for small businesses where they have deployed fiber and hybrid loops.[28] Other parties showed such claims are nonsense.

After investing billions in fiber and hybrid loops, ILECs have every incentive -- indeed a pressing need -- to maximize their service offerings for those customers, in order

[28] Petition at 17.

to win enhanced revenues from those customers. AT&T and Verizon both offer a full array of services designed for small business, and Qwest provided extensive evidence cataloguing its full range of small business offerings.[29] CenturyLink, for its part, offers a variety of service packages created specifically for small business. They include many of the very applications that Cbeyond and the CLEC commenters pretend that ILECs are failing to deliver.

Nor does the Commission's policy deny small businesses a choice of service provider. Cable providers, fixed wireless providers, mobile wireless providers, and satellite offer a growing array of alternatives to ILEC service. CLECs also are wrong to parrot Cbeyond's assertion that, absent fiber loop unbundling, CLECs must use T1 technology to serve for small business customers.[30] CLECs can seek access to fiber loops at negotiated, market rates. They can lease unbundled copper loops, and they routinely purchase wholesale DSL service. Small business customers have a broader range of choices than ever, and more small businesses will benefit from the Commission's existing policy as fiber loop investment continues to more and more communities.

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[29] *See, e.g.,* Qwest at 8-10 & Exh. A. Qwest also points out that ILECs are generally the "secondary player in the broadband market." *Id.* at 10-11. Cable providers are the primary market players, and they also are offering a wide range of services to the small business market.

[30] Petition at 16-17.

III. THERE IS NO LEGAL BASIS FOR DEPARTING FROM THE COMMISSION'S ESTABLISHED POLICY ON FIBER AND HYBRID LOOPS.

A. The petition provides no evidence sufficient to reverse Commission policy.

CenturyLink agrees with ITTA and other parties that the Petition offers no evidence, just assertions, to back this radical policy reversal.[31] The CLECs deliver nothing more. They endorse unsupported claims made by Cbeyond's Chief Marketing Officer[32] that the Commission should overturn policy and ignore conclusions reached in the *Triennial Review Order*. The views of a company's head salesman are not evidence.

CLECs also join Cbeyond in relying on the Berkman and ETI studies.[33] As other commenters pointed out, the Berkman study has been thoroughly discredited and cannot provide a sustainable foundation for any Commission policy change.[34] The Berkman study is fundamentally flawed as a matter of statistical analysis. Comments submitted to the Commission on that study showed it does not establish that unbundling has promoted broadband investment and penetration in other countries. In fact , the data actually showed just the opposite. The Berkman study purported to review the pool of existing

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[31] *E.g.,* ITTA at 3.

[32] Petition at att. A (Declaration of Brooks Robinson).

[33] Economic and Technology, Inc., *The Role of Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition* (2009) ("ETI Study") (attached to the Petition as Exhibit B); Berkman Center for Internet & Society, *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World* (Oct. 2009) ("Berkman Study".

[34] *E.g.,* AT&T at 23-24; Corning at 10-11; TIA/FTTH-C at 17-21; Verizon at 21-24.

expert literature on the subject, yet it insisted on what can only be a politically motivated conclusion despite acknowledging that the majority of econometric studies actually dispute its conclusion.[35]

Cbeyond and its supporters also claim a study by ETI shows that ILECs have "disinvested" because the Commission has limited unbundling of next generation facilities. The study is deeply flawed, and is obviously wrong.[36] The study points to a decline in "net book value" of telecom plant owned by AT&T, Qwest, and Verizon. However, it relies on depreciation as reported through ARMIS, when that data does not capture the bulk of broadband investment. The study assumes straight-line pricing of broadband plant, despite the fact that broadband investment today realizes vastly more capability than in 2001, let alone in its baseline date of 1996. Moreover, the study's conclusion is patently wrong. During the period when the study claims wireline providers were "disinvesting," broadband penetration soared from zero to two-thirds of American households.[37] Network capacity has grown at a phenomenal rate. Applications have multiplied many times over. Given the dramatic growth in bandwidth demand, ILECs are obliged to invest aggressively simply to maintain the level of quality of service consumers currently enjoy. ILECs face an economic challenge maintaining the existing network, and unbundling policy has unquestionably helped promote continued extension

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[35] *See* Berkman Study at 115.

[36] *E.g.*, Corning at 9-10; Qwest at 17-25; Verizon at 20-21.

[37] As Verizon points out, during the time that the ETI study claims ILECs were making a "large-scale cutback in investment," Verizon and AT&T alone had deployed fiber to 27 million households. Verizon at 20.

of fiber network to reach more and more American households and businesses. The ETI study cannot be relied upon to justify any change in Commission's policy.

B. The petition ignores the statutory standard for unbundling.

Cbeyond's handful of supporters also persists in ignoring the statutory standard for unbundling. Even leaving aside other requests within the Petition, the CLECs cannot show that they are impaired without access to unbundled fiber and hybrid fiber-copper loops.[38] The 1996 Act did not empower the Commission to make open-ended judgments that "more unbundling is better,"[39] and "Congress did not create a general duty to unbundle."[40] The burden is on the CLECs to provide "substantial evidence" that competitors would be impaired without unbundled access to fiber and hybrid loops.

To make that showing, CLECs must prove that competitors lack any "ability" to provide service without access to the unbundled network element.[41] Where "competition is possible" without a UNE, there is no impairment.[42] Moreover, "[t]he fact that CLECs can viably compete without UNEs ... precludes a finding that CLECs are impaired."[43] Here, the record shows that competitors are capable of competing. They are capable of

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[38] *See* AT&T at 15-22; Corning at 14-17; ITTA at 4-5; Qwest at 25-30; TIA/FTTH-C at 11-17; Verizon at 15-17.

[39] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*").

[40] *Triennial Review Order* at ¶ 72.

[41] 47 U.S.C. § 251(d)(2)(B).

[42] *USTA II*, 359 F.3d at 575.

[43] *Covad Communications v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006).

deploying their own fiber loops or high-speed broadband wireless loops. Competitors are using those loops today to compete successfully. CLECs, cable companies, fixed and mobile wireless providers and satellite providers are deploying broadband networks and marketing their services successfully to business and residential customers.[44]

The CLECs ignore unbundling precedent. The Commission has denied unbundling requests meant to promote a given business model. In the *Triennial Review Order*, the Commission said it "will not ... evaluate whether individual requesting carriers that pursue a particular business strategy are impaired without access to UNEs."[45] Unbundling is to be limited to "what must be shared" -- "to what is essential" -- and not "that which merely proves advantageous to a single competitor."[46] Moreover, "a carrier- or business plan-specific approach would be administratively unworkable for regulators, incumbent LECs, and new entrants alike," as it would necessitate "case-by-case determinations of impairment and continuous monitoring of the competitive situation"[47]

Several commenters also emphasized that the costs associated with unbundling fiber loops would outweigh any purported benefits.[48] Unbundling cannot be "mandated," even where there is some impairment, when unbundling "would pose excessive

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[44] Indeed, at a time when ILEC revenues are declining, Cbeyond's own business is growing.

[45] *Triennial Review Order* at ¶ 115.

[46] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999) (Breyer, J., concurring).

[47] *Triennial Review Order* at ¶ 115.

[48] AT&T at 22-26; Qwest at 30-32; Verizon at 17-24.

impediments to infrastructure investment."[49] The Commission and courts have consistently found that mandatory unbundling discourages investment by ILECs and by CLECs, and the Commission found that fiber loop unbundling would discourage investment.

The Commission cannot now reasonably find impairment based on this record, much less justify the full scope of so overbroad a petition. On the contrary, the evidence before the Commission shows that private investment and intermodal competition drive investment in next generation networks, and that unbundling of fiber facilities serves only to retard its deployment.

C. Reversing the Commission's settled unbundling policy would raise serious legal concerns.

Verizon rightly pointed out yet another legitimate concern. Even apart from failing rulemaking standards as arbitrary and capricious under the Administrative Procedures Act, such a policy reversal would raise constitutional concerns.[50]

The Commission adopted its current policy for the express purpose of promoting and incentivizing investments in fiber and hybrid fiber loops. In response, ILECs have invested heavily. ILECs made those investments at their own financial risk, but they "relied upon the Commission's unambiguous assertion that they would also be free to reap the full *rewards* of those investments without being forced to share advanced

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[49] *USTA II*, 359 F.3d at 580.

[50] Verizon at 25.

network elements with competitors."[51] Switching "back and forth" from one policy to another "in a way which required investors to bear the risk of bad investments at some times while denying them the benefits of good investments at others would raise serious constitution questions" under the Takings and Due Process Clauses.[52] Reversing the Commission's fiber unbundling rules also could be needlessly damaging to the agency's credibility within the investment community and industry.

Fortunately, there should be no need for these concerns. As the comments showed, the Petition fails to offer sufficient evidence for this radical change in Commission rules.

Respectfully submitted,

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[51] *Id.*

[52] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).