

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

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**I. INTRODUCTION AND SUMMARY**

Qwest Communications International Inc. (Qwest) submits these reply comments in response to the Commission’s *Public Notice* in the above-referenced docket.<sup>1</sup>

In its Petition for Expedited Rulemaking, Cbeyond proposes that the Commission require incumbent LECs to “provide unbundled access to the packetized bandwidth of hybrid loops, FTTH loops, and FTTC loops at retail rates”<sup>2</sup> and that “incumbent LECs offer a high bandwidth connection, between 6 and 10 Mbps, serving small businesses over fiber and hybrid loops at the lowest retail price offered by the incumbent LEC in the relevant MSA.”<sup>3</sup>

In its initial comments, Qwest demonstrated that the relief sought by Cbeyond is inconsistent with the Act’s impairment standard, ignores the tremendous fiber buildout that followed the Commission’s elimination of unbundling requirements applicable to fiber based facilities and neglects the tremendous negative impact on further fiber deployment that would result from additional unbundling requirements. The FCC’s elimination of unbundling for fiber

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

<sup>2</sup> Cbeyond Petition at 5.

<sup>3</sup> *Id.* at 21.

and hybrid loops in 2003 was rooted in the Commission's determination that CLECs are not impaired without access to fiber and hybrid loop facilities. In eliminating these requirements, the Commission applied the impairment standard that was refined and finally approved by the D.C. Circuit.<sup>4</sup> That standard is designed to promote the pro-competitive deregulatory goals of the Act by providing the correct incentives for all carriers to deploy their own fiber facilities. The Commission's judgment that eliminating fiber and hybrid loop unbundling would spur network investment has been more than borne out by the substantial BOC investment in fiber even in the face of less-than-favorable market conditions. The Economics and Technology, Inc. (ETI) study -- which purports to show the contrary is erroneous.<sup>5</sup> Moreover, the fundamental premise of the Petition, *i.e.*, that the unbundling relief did not bring competitive options to the small business market is contradicted by the many competitive options available to small businesses today.<sup>6</sup> A reversal in course on fiber and hybrid loop unbundling would imperil future investment and ultimately reduce consumer welfare.<sup>7</sup> Indeed, the limited benefits of fiber and hybrid loop unbundling are far outweighed by the significant costs such unbundling would impose -- including the stifling of fiber investment.

The first round of comments brought the anticipated CLEC support of the Cbeyond petition. It brought a lot more as well, as the CLECs treat the petition for rulemaking as a vehicle to impose additional requirements on the proposed ILEC fiber and hybrid loop unbundling scheme. Again with no reference to the concept of impairment, the CLECs requested particularized requirements tailored to their individual business plans. The sum of

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<sup>4</sup> Qwest Comments at 1.

<sup>5</sup> *Id.* at 1-2, 7-9.

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

<sup>7</sup> *Id.* at 25-26.

these requirements would be mandated access to ILEC fiber and copper networks at reduced prices. The CLECs, along with Cbeyond, expect the Commission to turn its regulations on a dime and totally disregard the prescriptions from the Supreme Court and the D.C. Circuit as to how to promote viable and enduring facilities-based competition.

In these reply comments, Qwest reinforces its position that there is simply no market problem present that would justify the Commission changing course on fiber and hybrid loop unbundling. Indeed, there is vibrant competition in the small and medium-sized business (or SMB) market, competition that is only likely to grow more robust as companies continue to evolve and deliver new products. In any case, positing a problem is not enough, particularly given the existence of the impairment standard, which functions as a strict gatekeeper to the relief the CLECs seek. Finally, Qwest will also debunk the QSI study commissioned by certain CLECs by identifying its erroneous inputs, omissions and misconceptions.

## **II. THE BENEFITS OF RELIEF FROM FIBER UNBUNDLING ARE TANGIBLE AND READILY APPARENT**

The premise of Cbeyond's Petition, which the other CLECs parrot, is that granting the BOCs relief from fiber and hybrid loop unbundling was a failed experiment. The CLECs contend that it did not promote investment,<sup>8</sup> and left the small business market segment neglected by ILECs.<sup>9</sup> Qwest demonstrated in its initial comments that Cbeyond's premise was, and remains, erroneous. The removal of fiber and hybrid loop unbundling requirements did promote investment and today the small business market has many competitive options.<sup>10</sup>

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<sup>8</sup> PAETEC at 6; Covad at 5.

<sup>9</sup> PAETEC at 4-7; COMPTTEL at 4-6.

<sup>10</sup> Qwest Comments at 7-9.

**A. Relief From Fiber Unbundling Has, And Continues To Generate Significant Investment.**

The Commission should pay particular attention to the comments of Corning Incorporated, who is “the world leader in production and sale of optical fiber and is the leading provider of optical cable in the United States.”<sup>11</sup> Corning notes that the Commission “unleashed a torrent of new capital spending on next-generation broadband networks”<sup>12</sup> when it determined that CLECs were not impaired without access to fiber and hybrid loops. Corning strongly opposes Cbeyond’s Petition because it understands that requiring unbundling of fiber and hybrid loops will stifle future investments in next-generation broadband networks.

As noted by Corning, the Obama administration seeks more investment in next-generation broadband networks in the U.S., and Corning as the largest fiber producer in the U.S., would certainly benefit from the realization of these goals. Significantly, Corning would likely benefit from increased broadband deployment regardless of who is building the networks; it would benefit if its fiber were used in broadband investments made by *any* entity, whether it is an ILEC, CLEC, cable company, municipal provider or any other provider. Thus, Corning supports policies adopted that would maximize the *total* deployment of these networks. It recognizes that grant of the Cbeyond Petition will result in *less* investment in total U.S. next generation broadband networks, and that the country’s overall broadband deployment goals will be threatened by the forced unbundling of fiber and hybrid loops.

**B. Qwest Is Placing A Significant Priority On The Small And Medium-Sized Business Market.**

The assorted proposals raised in the CLECs’ comments would only serve to broaden the regulatory shadow placed over ILEC networks. But, as Qwest noted in its initial comments,

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<sup>11</sup> Corning at 1.

<sup>12</sup> *Id.* at 2.

before any regulatory change-of-course can even be contemplated there must be a change in circumstances such that there is a problem that needs to be addressed. Of course, the CLECs posit the “neglected” small business market<sup>13</sup> as the problem the Commission needs to address on an expedited basis. But this is a straw man issue. The CLECs paint a highly misleading picture of the advanced services available to the SMB market. Looking beyond the CLECs’ fanciful characterizations to the actual reality of the SMB market reveals a market that is far from neglected. As we demonstrated in our initial comments, Qwest and other providers already provide a host of services to small and medium-sized business customers, and new innovative services are being developed and offered on a regular basis as technologies evolve. From a service perspective, Qwest has two large dedicated teams that focus on the specialized support necessary for small and medium sized businesses. Qwest small business customers have a dedicated team of small business professionals they can contact for any issue. Mid-sized business customers have a single point of contact assigned to each customer.

Contrary to CLEC assertions, as part of that specialized support, Qwest makes sure these businesses have affordable access to “big business” technology solutions. Qwest went beyond surveys or focus groups -- it followed small-business owners through their workdays and were struck by the time wasted on figuring out technology. Today, Qwest provides feature-rich high speed Internet, networking capabilities, and online tools such as website development and hosting, the ability to create multiple e-mail accounts, send faxes over e-mail and protect company data online. Qwest provides additional applications such as teleconferencing, online e-

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<sup>13</sup> The CLECs refer to the “small business market.” However, as noted in Qwest’s initial comments, Cbeyond’s Petition defines small businesses as businesses with less than 250 employees. Thus, this definition encompasses medium-sized businesses as well, and is normally referred to as the Small and Medium-sized Business, or “SMB” market.

commerce capabilities, security applications, collaboration tools, CRM (Customer Relations Management) applications and more.

Qwest also offers “cloud computing” options through its 17 data centers which serve 12 major markets as a part of its managed hosting service and cloud computing services. In fact, Qwest is seeing its greatest demand from business customers who are not big enough to gain the necessary economies of scale from operating their own data centers but still want security, reliability, and scalability. Qwest has found that customers are looking more critically at how they are procuring and consuming IT services and that customers see managed hosting and cloud computing as a more viable and cost-effective alternative to building things themselves. With its cloud computing options, Qwest has the ability to provide a very scalable, secure, business class, private cloud environment attached to national global assets to these customers.

Another example of Qwest’s “big business” tools for its small and medium sized businesses is the Qwest iQ® Data Bundle. This product is designed to fit a growing business' networking needs. The iQ® Data Bundle combines data networking, local access, rental equipment, installation, maintenance, and optional security features into a single solution. It is scalable -- providing multiple bandwidth configuration options to keep small businesses in step with their mission-critical applications, regardless of the size and location of their business. It is flexible -- as the small business' needs change, they are able to optimize bandwidth and networking hardware to cut costs and stay competitive at the same time. And, knowing that time is money to small businesses, the iQ® Data Bundle is provided with dependable service level agreements.

As demand for secure, reliable, high bandwidth connectivity continues to rise, Qwest’s Metro Optical Ethernet (QMOE™) provides a flexible, highly scalable solution that delivers

switched, Ethernet connectivity to enable healthcare providers to extend their local area networks with control over routing and traffic prioritization. It combines the simplicity and low cost of Ethernet with the speed and reliability of optical fiber to deliver flexible, highly scalable connectivity between hospitals, clinics, laboratories, and business offices across a metropolitan area.

Understanding the importance that technologically advanced capabilities will play in healthcare as initiatives driven by the American Recovery and Reinvestment Act (ARRA) are implemented, and understanding that many of these initiatives will be implemented by small businesses such as clinics and doctors' offices, Qwest offers cost effective solutions to these healthcare providers. Qwest understands healthcare providers must balance the need to implement advanced technologies to improve efficiency and the quality of care with a mandate to reduce overall healthcare costs.

These examples, along with the products and services discussed in Qwest's initial comments in this docket,<sup>14</sup> clearly demonstrate that the bleak picture painted by CLECs regarding ILEC attention to the SMB market is far from the truth. Small and medium-sized businesses have access to a wide variety of cost-effective advanced services to fit their business needs and those needs are fulfilled without taking the draconian regulatory step of requiring Qwest to unbundle its fiber network.

**C. The Small Business Market Has Numerous Competitive Options In Addition To Qwest.**

Like Cbeyond, the CLECs who filed initial comments in this proceeding argue that unless ILECs are required to provide unbundled fiber and hybrid loops, small and medium-sized businesses will be denied access to a sophisticated portfolio of business applications at prices

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<sup>14</sup> Qwest Comments at 20-21 and its Exhibit A.

suitable for small and medium-sized businesses. These CLECs contend that only these CLECs have the ability or motivation to provide these “next generation” services, and that the CLECs can only serve this market if they have access to ILEC unbundled fiber and hybrid loops. These claims are not supported by the evidence. Our initial comments, in addition to describing the products Qwest offers to the SMB market, also described the offerings of cable and CLEC competitors that meet the needs of small and medium-sized businesses -- all of which are provided today in the absence of fiber and hybrid loop unbundling. For example, as we described, both Comcast and Cox today focus on providing advanced services to small and medium-sized businesses.<sup>15</sup>

In its comments, Integra and One Communications (Integra) provided a description of the types of services that small and medium-sized businesses are allegedly being denied without CLEC access to unbundled fiber and hybrid loops. According to Integra, these customers today are currently denied *Advanced Packetized Telephony Services, High Capacity Internet Access Applications, VPN and High Bandwidth Private Line Services and High Capacity Imaging and Video Services*.<sup>16</sup> It is noteworthy that these are the exact types of services that are actively marketed by Qwest (as described above) and many of Qwest’s competitors today -- all without the use of ILEC unbundled fiber and hybrid loops. To demonstrate this, all one has to do is look at the services that are marketed to small and medium-sized businesses by Cox Communications, a major competitor in several Qwest cities including Phoenix and Omaha.

As described in Qwest’s initial comments, Cox competes vigorously with Qwest in the business market, providing a broad range of business products to small, medium and large business customers throughout its serving area. Cox offers *Advanced Packetized*

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<sup>15</sup> *Id.* at 10-15.

<sup>16</sup> Integra at 4-5.

*Telephony Services and High Capacity Internet Access Applications* -- including “Cox Business Internet” and “Cox Optical Internet.” According to Cox, with these services, businesses are “connecting to Cox’s own nationwide fiber-optic IP backbone that operates over multiple redundant 10 Gigabit connections.”<sup>17</sup> Cox also offers *VPN and High bandwidth Private Line Services*, including “Metro Ethernet Service” that, according to Cox, “delivers high-speed, metro-area-wide Ethernet connectivity that allows [a] business to employ the latest technologies, combining voice, video and data connections.” Cox notes that “Metro Ethernet can provide a higher bandwidth value than legacy technologies such as frame relay.”<sup>18</sup> Cox also offers “Cox Virtual Private Network” service that “is a fully managed, turn-a-key-and-you’re-done solution” giving “employees in any location fast, secure access to your network.”<sup>19</sup> Finally, Cox offers high speed private line services from DS1 all the way to OC192.<sup>20</sup>

Integra also claims that small and medium-sized businesses in the medical field do not have available services that would provide customers with “the ability to transmit high-resolution medical image files and telemedicine applications.”<sup>21</sup> Cox, in fact, offers and actively markets just such services. On its web site, Cox provides specific “case studies” of the services it provides to the small and medium-sized business market, including the real estate, government, education, hospitality and *healthcare* industries. The Cox website

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<sup>17</sup> See: <http://ww2.cox.com/business/arizona/data/optical-internet.cox>

<sup>18</sup> See: <http://ww2.cox.com/business/arizona/data/metro-ethernet.cox>

<sup>19</sup> See: <http://ww2.cox.com/business/arizona/data/vpn.cox>

<sup>20</sup> See: <http://ww2.cox.com/business/arizona/data/private-line.cox>

<sup>21</sup> Integra at 5.

contains several specific case studies for healthcare providers that show how it is meeting the needs identified by Integra. One of the case studies is included as Exhibit A.

The case study in Exhibit A provides just one example of how Cox Communications is meeting the needs of small and medium-sized businesses -- all without purchasing unbundled fiber and hybrid loops from an ILEC. Of course Comcast and other cable providers also offer similar services to small and medium-sized businesses, as noted in Qwest's initial comments. Thus, the CLECs' claim that small and medium-sized business needs can only be met if CLECs are provided access to unbundled fiber and hybrid loops is not accurate.

Cbeyond and other CLECs that focus on the small and medium-sized business market have been successfully growing revenues without access to unbundled fiber and hybrid loops.<sup>22</sup> As noted in Qwest's initial comments, Cbeyond's revenues tripled between 2004 and 2008. Revenues for other CLECs, including Integra, PAETEC and XO have also increased although much of these increases may be attributed to merger activity. One interesting case, however, is tw telecom. While tw telecom acquired Xspedius in 2006, it has continued to grow revenues organically over the past three years, even given tough economic conditions. tw telecom revenues increased from \$1.084 billion in 2007 to \$1.211 billion in 2009.<sup>23</sup> As noted in Qwest's initial comments, tw telecom focuses on the small, medium and enterprise business markets, and offers a wide range of telecommunications services including business voice service, dedicated high capacity services, digital trunks, ISDN, long distance, dedicated Internet access, LAN services and MPLS IP VPN service. tw telecom provides services "principally utilizing our fiber facilities" and says that it "continue[s] to extend [its] network in [its] present markets in order to reach additional office buildings and business parks directly with [its] fiber facilities." tw telecom also states that:

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<sup>22</sup> Qwest Comments at 10-15.

<sup>23</sup> tw telecom 2009 Earnings Report, 2-10-10.

Our focus on using our fiber facilities-based services, rather than reselling network capacity of other providers, requires that we make significant capital investments to reach new and existing customer locations. We invest selectively in growth prospects that often require that we install fiber in buildings, purchase electronics, construct fiber rings, and invest in product expansion. . . . To serve a new customer who is not in a building where we have existing facilities, we may use various transitional links, such as leased circuits from another LEC. When a customer's monthly spend increases to a sufficient level, we may invest additional capital to connect our own fiber to the customer's premises in order to accommodate the customer's bandwidth needs and to increase our operating margins."<sup>24</sup>

What is interesting about tw telecom -- who did not file comments in this case -- is that it has developed its business market, and has shown rapid growth, without the ability to purchase unbundled fiber and hybrid loops from ILECs. While it still purchases some UNEs, it is following the path that Congress envisioned when it passed the Telecommunications Act in 1996 -- that UNEs would serve as a *transitional* mechanism for CLECs as they built out their network. This is in contrast to the business plans of some CLECs -- like Cbeyond -- who would apparently like to rely on ILEC networks forever, and ask the Commission to mandate new unbundled offerings for the convenience of its business plan.

### **III. THE CLECS' REQUESTS FOR UNBUNDLING AND COST-BASED PRICING PROPOSALS IGNORE THE PROCESS FOR DETERMINING IMPAIRMENT**

The CLECs' comments devote a significant amount of attention to the type of access to fiber facilities they should be provided and how the access should be priced. But, as Qwest noted in its initial comments,<sup>25</sup> this begs the question of whether the CLECs are entitled to such access. The CLECs seem to be operating under the assumption that all they need to do is to demonstrate that unbundled access to fiber and hybrid loops would help them serve small

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<sup>24</sup> tw telecom 2009 Form 10K at 5 and 9, signed Feb. 12, 2010.

<sup>25</sup> Qwest Comments at 27-29.

business customers, and then they will be entitled to unbundled access to the facilities at their desired price. But the CLECs omit a substantial part of the process for determining impairment.

**A. Some Commenters Dramatically Understate The Record That Would Be Necessary For The Commission To Enter An Order Requiring The Unbundling Requested In The Cbeyond Petition.**

Some commenters, echoing claims made in the Petition, seem to take the position that the Commission can lawfully order the unbundling of ILEC fiber and packet facilities and services upon a finding by the Commission that perhaps it should not have eliminated the fiber and hybrid loop unbundling rules in the first place.<sup>26</sup> The implication is that, if the FCC were to find in retrospect that the foundation of its earlier deregulatory decision was not as sound as it had hoped, that fact alone would be sufficient to reinstate the discarded unbundling regulations. This is simply not an accurate portrayal of the law.

No one doubts that the Commission has the obligation to examine its rules (or lack thereof) and make necessary modifications to adjust for changed circumstances. This is true even if such further analysis requires the Commission to reverse a prior position or analysis.<sup>27</sup> However, any change in course by a regulator must be explained and justified under the Administrative Procedure Act on the same basis as the proposal for any new rule. The Commission is rightly expected to take steps to keep its regulations up to date, something that is especially important in an area where technology and markets are changing as rapidly as they are in the telecommunications field. If a record were to be established that demonstrated that the

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<sup>26</sup> See, e.g., Covad at 6 (“When its prediction is incorrect, the Commission has full right to reverse course and require more, rather than less, unbundling.”). See also PAETEC at 7 (“As a threshold matter and as the Petition explains, D.C. Circuit precedent requires the FCC to reexamine when circumstances show that the predicate for issuing the decision is not accomplishing the desired results.”)

<sup>27</sup> See *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), cert. denied, *Galaxy v. FCC*, 506 U.S. 816 (1992).

unbundling requested by Cbeyond met the “impairment test” of Section 251(d)(2) of the Act, the Commission would be well within its authority to direct state arbitrators to order such unbundling in interconnection agreements. This legal analysis is not disputed. However, the record is clear that the impairment test cannot be met for the services and facilities subject to the Cbeyond Petition -- there is no impairment without access to unbundled fiber and hybrid loops.

But Covad and PAETEC, along with Cbeyond, seem to advocate a different standard for network elements that were once required to be unbundled but were later freed from unbundling requirements by the FCC. They imply that the FCC need not undertake a full Section 251(d)(2) analysis -- based on the current record in these situations. Instead, they argue that, if the current FCC would never have eliminated those unbundling requirements in the first place, that by itself would be sufficient to resurrect the old regulatory regime. This is clearly incorrect. The Commission can grant all or part of the Cbeyond Petition only upon a proper impairment analysis, based on the current record, that demonstrates that CLECs are “impaired” in the absence of unbundled access to the elements in question.

The Commission does not have the right to take a regulatory “Mulligan” when it makes a decision to reduce the regulatory burdens imposed upon a service or facility. This is especially true in the area of regulations as dramatic and burdensome as the unbundling rules -- where the Commission’s first three attempts at establishing a lawful unbundling standard met with court reversals because they were too expansive.<sup>28</sup> The position of Covad, PAETEC and Cbeyond is really a very belated request for reconsideration of the Commission’s deregulatory orders, whereas the Cbeyond Petition must be treated as a request for a new rule. Petitions for

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<sup>28</sup> *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 387-92 (1999); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002); *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 572-73 (D.C. Cir. 2004) (subsequent case history for each omitted).

reconsideration are governed by statute,<sup>29</sup> and the Commission does not have the ability to “reconsider” a decision many years after it was issued<sup>30</sup> -- the Commission must judge its new rules on their own merits on the current record, not based on what is tantamount to reconsideration of an old decision.<sup>31</sup> Even if the Commission were to find that some of its predictions in prior unbundling decisions were incorrect (a finding that Qwest submits is simply impossible), that would not be sufficient to warrant the imposition of fresh unbundling requirements on ILECs because of the myriad of other factors that have entered into the analysis in the ensuing years. The Commission would need to affirmatively find and justify, consistent with the solid judicial precedent that must govern such decisions, that each fresh unbundling that it ordered was consistent with and justified by Section 251(d)(2) of the Act. This is a heavy burden indeed, one that Cbeyond and its supporters have not come close to meeting.

This conclusion is neither complex nor controversial. The time for reconsideration of the Commission decisions regarding the unbundling of the services and facilities raised by Cbeyond passed many years ago. Any decision granting any part of the action requested by Cbeyond

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<sup>29</sup> 47 U.S.C. § 405.

<sup>30</sup> The time limits for filing a petition for reconsideration are established by law and are jurisdictional in nature. See *In the Matter of Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52, 251 U.S. App. D.C. 93 (D.C. Cir. 1986). See also *Petition for Amendment of the Commission’s Rules to Establish First and Second Class Radiotelephone Operator Licenses*, Order, 10 FCC Rcd 3196 ¶ 2 (1995). We note the filing requirement of Section 405(a) of the Act applies even if the petition for reconsideration is filed only one day late. See, e.g., *Panola Broadcasting Co.*, Memorandum Opinion and Order, 68 FCC 2d 533 ¶ 2 (1978); *Metromedia, Inc.*, Memorandum Opinion and Order, 56 FCC 2d 909, 909-10 (1975). The Commission’s rules similarly limit the time the agency can reconsider an action on its own motion. 47 C.F.R. § 1.108.

<sup>31</sup> Even though there may be situations where the notice and comment provisions of the Administrative Procedure Act may be less stringent when the Commission is considering reimposition of a discarded rule, *Sprint Corporation v. FCC*, 315 F.3d 369, 374-5 (D.C. Cir. 2003), in such circumstances the full analytical requirements of the APA must nevertheless be met in order to justify such reimposition. *American Mining Congress v. EPA*, 907 F.2d 1179, 1188-1189 (D.C. Cir. 1990).

cannot be treated as if it were simply a reconsideration petition. The Commission would need to affirmatively demonstrate the public interest need for such action. The test for such an evaluation is found in Section 251(d)(2) of the Act.

**B. Any Discussion Of Pricing Is Premature.**

Several of the other CLECs have filed comments that support the requirement that ILECs provide unbundled access to ILEC fiber and hybrid loop facilities, but they propose different pricing schemes.

As an initial matter, as Qwest, Verizon and AT&T have pointed out, it is very unclear what Cbeyond is actually proposing -- it discusses the need for unbundled fiber and hybrid loops, but then proposes an unbundled service that is actually a new bandwidth service that is between a DS1 and a DS3. As Qwest and some other parties described in initial comments,<sup>32</sup> it appears that Cbeyond would like such a new service simply to enhance the execution of its business plan. As Qwest demonstrated in its initial comments,<sup>33</sup> Cbeyond can meet its needs for bandwidth between 1.5 and 45 Mbps by purchasing multiple DS1s or a DS3, and is not impaired without access to fiber and hybrid loops or the “new” 6-10 mbps offering. Neither Cbeyond nor the other CLECs have demonstrated that CLECs are impaired without access to these facilities. Since this subject is addressed in detail in Qwest’s initial comments, we will not repeat that discussion here.

As Qwest demonstrated in its initial comments, there is no basis for the unbundling of fiber and hybrid loops or the requirement that ILECs provide a new 6-10 mbps service at *any* price. Nonetheless, various CLECs have proposed different pricing requirements for the “new” elements. While Cbeyond proposes that the Commission set a price for these “new” elements at

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<sup>32</sup> Qwest Comments at 25-26; AT&T at 2; Verizon at 24-25.

<sup>33</sup> Qwest Comments at 25-26.

the “lowest retail rate,” XO and Covad propose different pricing schemes –XO proposes that prices be set at TELRIC,<sup>34</sup> and Covad proposes that prices be set based on an “actual cost, rate-of-return methodology.”<sup>35</sup>

There is absolutely no basis for XO’s proposal to set TELRIC-based rates for fiber and hybrid loops when the Commission has determined that CLECs are not impaired without access to these elements. XO attempts to support its proposal by referring back to the Commission’s *Local Competition Order*, and the *Order’s* explanation of why prices for UNEs should be set based on TELRIC. It claims that TELRIC “remains the law of the land.”<sup>36</sup> However, Section 251 UNEs were priced at TELRIC because CLECs were determined to be *impaired* without access to these elements. The Commission has already determined that CLECs are *not* impaired without access to fiber and hybrid loops and no party has demonstrated that CLECs are impaired without a new unbundled 6-10 mbps loop offering. Covad proposes that “wholesale open access for hybrid and fiber loops could be priced using an actual cost, rate-of-return methodology”<sup>37</sup> but it never provides an explanation as to exactly what that means. Certainly there is no basis for setting prices for any service based on such an undefined construct.

In sum, there is no basis to require ILECs to provide fiber and hybrid loops to CLECs at *any* price, since CLECs are not impaired without access to these elements. Further, as described in Qwest’s initial comments, forcing ILECs to offer its broadband network on an unbundled basis to competitors would discourage investment and innovation, as the Commission found in the *Triennial Review Order*.

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<sup>34</sup> XO at 9-11.

<sup>35</sup> Covad at 17.

<sup>36</sup> XO at 11.

<sup>37</sup> Covad at 5.

#### **IV. THE CLECS' EXPANDING WISH LIST DEMONSTRATES THAT MANDATORY UNBUNDLING IS NOT THE SOLUTION TO THE CLECS' PURPORTED PROBLEM**

What began as a request by Cbeyond for access to 1.5 Mbps to 6 Mbps of ILEC fiber loops at ILEC retail prices has, via the comments of various CLECs, expanded to a request for access to a channel ranging from 1.5 Mbps to 45 Mbps.<sup>38</sup> And the CLEC commenters also want the Commission to require ILECs to maintain their copper networks.<sup>39</sup> The reality is that CLECs have different “needs” and if the Commission opens the door on fiber unbundling as requested by Cbeyond, these purported “needs” will quickly snowball. As the CLECs’ proposals expand, this places a greater anticipated burden on ILEC networks which apparently would have to be the canvasses on which the CLECs not only differentiate their products but also provision their products. The enveloping reach of the CLECs’ proposals counsels even more for a continued deregulatory approach based on providing incentives for self-provisioning or third-party leasing as opposed to mandatory unbundling. An approach that does not rely exclusively on the ILEC network will allow carriers more flexibility to tailor their offerings to their customers.

##### **A. The CLECs Are Essentially Asking The Commission To Require ILECs To Maintain And Support Fiber And Copper Networks.**

In fact, there appears to be some question regarding the underlying premise of the Cbeyond Petition, *i.e.*, that unbundled fiber and hybrid loops are needed for CLECs to deploy more sophisticated business applications to the small business market. Some CLECs indicate, like Cbeyond, that they cannot serve small businesses without access to ILEC high-capacity packetized loops as TDM-based UNEs, and that special access services are allegedly not suitable

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<sup>38</sup> Covad at 2.

<sup>39</sup> *Id.* at 5.

for providing many of the high-capacity services they provide or seek to provide.<sup>40</sup> They then explicitly state that incumbent copper loops are inherently limited in the services they can provide.<sup>41</sup> But XO posits that given its nationwide reach, copper facilities can be used for faster and more cost-effective deployment of broadband than other technologies, including the fiber facilities *that currently extend to less than twenty percent of the nation's business locations*. XO notes in an *ex parte* filed February 12, 2010 that “advances in copper technology have enabled the deployment of “Ethernet Over Copper” (“EoC”) technology, which supports data speeds up to 45 Mbps today and possibly greater than 100 Mbps in the future.” XO concludes “Certainly, the cost-effective deployment of EoC promises important benefits...by attracting small, medium, and large businesses that require high-speed transmission services.”<sup>42</sup>

Not only is this an indication of the CLEC industry not being on the same page, but it reflects a sort of entitlement mentality in regard to access to the ILECs' network. The CLECs do not view the fact that one CLEC's business plan prefers fiber loops and another prefers copper loops as a problem. They simply expand their proposal such that it supports mandatory unbundling of fiber loops and the maintenance of copper networks. Thus, under this expanded CLECs' proposal, the ILEC must incur the costs of supporting two networks to further CLEC business plans.

**B. Qwest's Limited Copper Retirement Is Not Impinging On CLECs' Access To Copper.**

Up to this point, Qwest has not retired any copper plant in response to its FTTH or FTTC deployment. In fact, Qwest's recent copper retirements have been related to government-

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<sup>40</sup> Integra at 4-5.

<sup>41</sup> *Id.* at 6.

<sup>42</sup> XO Communications, LLC *ex parte*, filed Feb. 12, 2010 at 2; *see also*, Covad at 4.

mandated relocation of facilities. During such relocation, Qwest may take the opportunity to replace copper with fiber as warranted. While not required to do so, since the retirement does not pertain to greenfield fiber deployment, Qwest notices the copper retirement via network disclosures. In fact, pursuant to one such notification, Integra objected to the copper retirement but withdrew its objection because it was able to transition all of its customers to different types of unbundled loops that the fiber-fed digital loop carrier system could support.<sup>43</sup>

Qwest, by no means, wants to suggest that it will not retire copper in the future pursuant to network management considerations and when it does it will make the appropriate disclosures. The point is, in the Qwest territory, CLECs have not experienced a lack of access to copper loops due to FTTH or FTTC deployment. As with other CLEC complaints in this proceeding, they are anticipating a problem before it even exists.

**C. The Berkman Study Does Not Further The Case For Mandatory Unbundling.**

Like Cbeyond, Covad and PAETEC argue that the *Berkman Report* provides “powerful evidence” that broadband deployment has been more successful in countries that have stringent “open access” policies. Based on the conclusions of this report, they argue that the United States can only “catch up” to these countries if the Commission requires the unbundling of fiber and hybrid loops as proposed by Cbeyond. However, the *Berkman Report* has been totally discredited by a host of economists and other expert analysts, as pointed out in the comments of AT&T, Verizon and Corning in this proceeding, and as demonstrated in the comments filed by numerous parties in the Commission’s Broadband and other proceedings (GN Docket No. 09-47,

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<sup>43</sup> See letter from Russell C. Merbeth, Integra Telecom, Inc. to Marlene H. Dortch, FCC, Re Report No. NCD-1791, rel. Oct. 9, 2009, Wireline Competition Bureau Short Term Network Change Notification Filed by Qwest, Copper Retirements in AZ, IA, MN, NM, ND, SD, UT & WY; withdrawn by Integra in January, 2010.

*et al.*).<sup>44</sup> These parties have demonstrated that the Berkman Study is severely flawed and distorts evidence regarding what factors are driving broadband investment in other countries. As summarized in AT&T's comments in the Broadband proceeding:

..... the Report delivered by the Berkman Center is neither comprehensive nor competent. It ignores or summarily dismisses a wealth of literature and analysis that directly contradicts its conclusions; it relies on data sets regarding broadband performance that are unreliable on their face and even more so when subjected to expert review; it makes bald misstatements regarding the United States' experience with "open access" regulation; and it attempts to disguise its subjective bias by employing an econometric model that experts in the field have condemned as unprofessional and lacking in objectivity. In light of these many failings, the Commission cannot rationally rely upon the Report's analysis or conclusions in formulating the National Broadband Plan.<sup>45</sup>

Since the significant flaws in the *Berkman Report's* methodology and conclusions have been discussed at length in these comments before the Commission, Qwest will not repeat all of those arguments here, but will offer a brief sampling of some of the *Berkman Study's* erroneous conclusions. In a recent paper filed February 2010 in the Canadian Broadband proceeding,<sup>46</sup> Dr. Robert Crandall provides an updated view of the studies and literature regarding broadband around the world. This paper summarizes the deficiencies in the *Berkman Report's* conclusions regarding broadband deployment and unbundling in Europe:

The international comparisons provided by the Berkman Center Report are simply not convincing. For instance, the Report refers approvingly to the alleged effects of unbundling in several Nordic countries and in the Netherlands without pointing out that platform-based competition from cable television and government-

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<sup>44</sup> See comments and declarations filed on Nov. 16, 2009, in GN Dockets Nos. 09-47, 09-51 and 09-137 by AT&T, Verizon, Empiris LLC (Robert W. Crandall, Everett M. Ehrlich and Jeffrey A. Eisenach), Telecommunications Industry Association, United States Telecom Association and other parties.

<sup>45</sup> See Comments Of AT&T Inc. On Berkman Center Report National Broadband Plan Public Notice #13, filed Nov. 16, 2009 at 1 (footnotes omitted).

<sup>46</sup> Before the Canadian Radio-television and Telecommunications Commission (CRTC) Notice of Consultation 2009-261 -- Proceeding to consider the appropriateness of mandating certain wholesale high-speed access services.

provided fiber networks (in Sweden) generally provide many more broadband connections than unbundled copper loops. It cites France, which relies heavily on network unbundling, as a “success” and Germany which relies much more heavily on platform competition from cable as a “failure” despite the fact that the two countries have similar broadband penetration and essentially no fiber to the premises. And the Berkman Center Report reflects approvingly upon the United Kingdom’s “success” with network unbundling and functional separation without pointing out that since the UK adopted its new, more aggressive policy, broadband growth has slowed substantially. Before the change in policy, UK broadband subscriptions were growing more rapidly than connections in the rest of the EU-15; since the new policy, they have grown more slowly.<sup>47</sup>

Cbeyond and PAETEC place a particular reliance on the *Berkman Report*’s discussion of Japan. PAETEC states: “In Japan, for example, NTT is required to provide unbundled access to fiber loops. Yet NTT continues to invest in deploying more fiber and other companies are deploying their own fiber facilities.”<sup>48</sup> While the *Berkman Report* provides flawed analysis of many countries, the CLEC’s particular emphasis on Japan compels a brief description of the study’s methodology and conclusions regarding this country. As Verizon notes: “Japan is *behind* the United States in terms of broadband penetration, despite the favorable demographics of that country -- *i.e.*, a dense, wealthy population that mostly lives in multi-dwelling units.”<sup>49</sup> AT&T reveals that in Japan, “fiber deployment has been heavily subsidized by the government and therefore is a particularly poor case study.”<sup>50</sup> AT&T also points out that “Nippon Telegraph and Telephone Corporation (NTT) - Japan’s largest telecom firm, which is one-third owned by the Japanese government -- has criticized the Berkman paper as being ‘seriously in error regarding numerous aspects of the history and current status of the Japanese broadband marketplace.’” In

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<sup>47</sup> Comments of Robert Crandall on behalf of TELUS, Feb. 8, 2010 at 9-10 (Before the Canadian Radio-television and Telecommunications Commission (CRTC) Notice of Consultation 2009-261 - Proceeding to consider the appropriateness of mandating certain wholesale high-speed access services). See: [http://www.crtc.gc.ca/PartVII/eng/2009/8663/c12\\_200907321.htm](http://www.crtc.gc.ca/PartVII/eng/2009/8663/c12_200907321.htm).

<sup>48</sup> PAETEC at 13 (footnotes omitted).

<sup>49</sup> Verizon at 22 (footnotes omitted).

<sup>50</sup> AT&T at 23-24.

particular, NTT states that ‘facilities based competition, not unbundling, has been the key spur to broadband growth in Japan.’” The aforementioned paper by Dr. Crandall further describes the situation in Japan:

. . . . But while it is correct to say that MIC [the Japanese regulatory body] has nominally required its incumbent carrier, NTT, to unbundle its fiber facilities, there has been little such unbundling in Japan because the regulator apparently has set the wholesale price of fiber very high and does not or cannot require unbundling of NTT’s individual fiber connections. As a result, NTT apparently has not been forced to unbundle its new fiber to the premises despite the professed public position of its regulator. This has allowed NTT to invest heavily in fiber to the premises with little fear that it will have to lease the fiber to its competitors.

These are just a few examples of the misdiagnosis of the relationship between unbundling and broadband deployment in other countries that is provided in the *Berkman Report* -- errors that that have been detailed by multiple commenters in this and other proceedings. It is clear that the Commission should place no weight on the flawed *Berkman Report*, or beyond, Covad and PAETEC’s regurgitation of its findings. This study, along with the ETI study (which is addressed in Qwest’s initial comments) and the QSI study (described elsewhere in these comments) are each fatally flawed, and provide no meaningful guidance for the Commission.

## **V. THE QSI STUDY PROVIDES A FLAWED AND DISTORTED VIEW OF THE BENEFITS OF MANDATORY UNBUNDLING**

### **A. Self-Provisioning Is A Viable Option For CLECs.**

In this proceeding and the Broadband proceeding, Covad filed a study prepared by QSI Consulting.<sup>51</sup> In its study, QSI concludes that CLECs are generally unable to viably construct and operate their own facilities except under very favorable conditions, such as when a large number of customers are located at extremely short distances from an existing metropolitan fiber

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<sup>51</sup> Comments of Covad in response to NBP Public Notice #13, GN Docket Nos. 09-47, 09-51 and 09-137, filed Nov. 16, 2009.

ring. However, as described below, the QSI study is fatally flawed, and does not provide meaningful or reliable information.

There are two overarching problems with QSI's conclusion. First, essentially QSI is contending that only in the rarest of cases will a CLEC *ever* be able to self-provision facilities. To put this in perspective, it is now over 14 years since the enactment of the Telecommunications Act of 1996, and many CLECs are apparently no closer to self-provisioning in many areas than they were over a decade ago.<sup>52</sup> As Qwest noted in its initial comments, the intent of the Act was to establish UNEs as a transitional mechanism to jump-start competition, but to wean CLECs off of ILEC networks so as to spur facilities-based competition.<sup>53</sup> Only with facilities-based competition will there be product differentiation and substantive price competition. Today, there is facilities-based competition from cable and wireless providers and *some* CLECs, and this is spurring product differentiation and price competition. But the CLECs who continue to depend on the ILEC network are not contributing to this facilities-based competition, and according to QSI they will not do so in the foreseeable future.

Second, QSI seems to believe ILECs must continue to build facilities, at their own risk, to meet the needs of CLECs. However, Qwest cannot simply pursue an "if we build it, they will come" strategy. Qwest is in no position to risk placing investment that does not generate sufficient revenue to recoup its costs. Thus, Qwest has to prudently target its capital investment to areas in which it can maximize its ability to meet identified demand. But even with such

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<sup>52</sup> While many CLECs deploy fiber in only limited locations, tw telecom has deployed fiber to many locations, and has shown that this can be a lucrative business plan. tw telecom, whose revenues continue to increase, states: "Our focus on using our fiber facilities-based services, rather than reselling network capacity of other providers, requires that we make significant capital investments to reach new and existing customer locations." (See tw telecom 2009 Form 10K, released in February 2010.)

<sup>53</sup> Qwest Comments at 3-4.

targeting, there are no guarantees of success; Qwest has to take risks like any other carrier that invests in facilities. At the same time it has the costs of maintaining its existing network. The CLECs, at least those who do not self-provision, do not have to take these risks because the ILEC is bearing them. In essence, the CLECs are pursuing a “if the ILEC builds it, we will come” strategy. As described elsewhere, in the *TRO* the Commission determined that unbundling of fiber and hybrid loops should not be required, with the understanding that this would incent fiber investment by ILECs –a predictive judgment that has proven correct. Now that fiber loop plant has been added to the ILEC networks, CLECs want access to it on an unbundled basis. However, this will only discourage future investment in broadband networks.

**B. QSI’s Inaccurate Determination Of The Costs Of Wholesale Inputs Discredits Its Price Squeeze Argument.**

The QSI study concludes that CLECs who are dependent on ILEC “last mile” distribution facilities are effectively foreclosed from widespread provision of competitive broadband services under the FCC’s existing “unbundling rules because the gap between the retail price and lease cost is allegedly too narrow.” One of the conclusions that QSI reaches is that the lack of unbundled access at cost-based prices impedes competition in the broadband market. QSI bases this finding on an analysis of various leased loop deployment scenarios including what it labels: (1) all-copper loops; (2) hybrid fiber/copper loops; (3) all fiber loops. These scenarios should not be confused with the fiber and hybrid loop unbundled elements requested by Cbeyond in this proceeding as the QSI “hybrid fiber/copper loops” and “all fiber loops” scenarios present lease scenarios including a combination of special access services and unbundled network elements that are available today. QSI examines the cost of these scenarios for ten different Metropolitan Statistical Areas (MSAs). Based on this analysis, QSI concludes that limitations on CLECs’

ability to compete more broadly are the result of “escalating costs as configurations over fiber facilities have to be purchased at higher, non-UNE based prices.”<sup>54</sup>

In support of this conclusion, QSI presents a table on page 16 of its report which lays out the “lowest” and “highest” rates for the various deployment scenarios [the three lease scenarios] in several MSAs throughout the U.S.<sup>55</sup> The two Qwest MSAs included in the table are Phoenix, Arizona and Seattle, Washington. For the deployment scenarios which involve all-copper loops and hybrid loops, QSI breaks down the rates shown on the table by *TRRO* impaired wire centers and non-impaired wire centers, using UNE and special access rates respectively. The transport rates used in the QSI analysis are calculated assuming 10 miles of transport and the special access rates are calculated assuming a 36-month term plan. QSI does not specify how many 2-wire UNE loops were used in their calculation for the bonded pair.

The QSI study shows the “lowest” rate for a 2-wire UNE loop and DS3 UNE transport (the “all copper loop” scenario) in a Phoenix *TRRO*-impaired wire center to be \$63.81 and the “highest” rate to be \$118.59. Qwest calculated<sup>56</sup> the “lowest” Arizona rate at \$327.05 and the “highest” rate to be \$354.44. Qwest was unable to determine how QSI reached its component cost figures for the leased network services and unbundled network elements based on Qwest’s rates. Qwest’s Arizona Zone 1 (lowest rate) 2-wire unbundled loop rate is \$9.05. Qwest’s Arizona unbundled DS3 transport rate for a 10-mile band fixed component is \$159.00 and the rate per mile is \$15.90 (times 10 miles). The actual Qwest rates in Arizona are much different than that portrayed by QSI. Thus, Qwest was unable to match the rates shown by QSI in their

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<sup>54</sup> Covad at 12-13, *citing*, QSI Report at 17-19.

<sup>55</sup> QSI Report at 16. “Lowest” and “highest” denotes lowest and highest rate zones.

<sup>56</sup> Qwest uses its current rates from the Arizona and Washington UNE price lists, as well as its FCC tariffs for special access in its analysis.

table using the components that QSI described in the table. Qwest had the same problem when trying to recreate *any* of the rates shown on this table for all the scenarios shown in both Arizona and Washington.

QSI also attempted to demonstrate that the costs for leasing facilities in non-impaired wire centers are much greater than in impaired wire centers. While it is true that the costs of leasing facilities is greater in non-impaired wire centers, the FCC has determined that CLECs have competitive options to UNEs in those wire centers. Even so, the QSI study is misleading regarding the extent to which Qwest has been granted non-impairment under the *TRRO* in both Arizona and Washington. 2-wire and DS1 unbundled loops are available in all 48 wire centers within the Phoenix MSA. In Seattle, 2-wire unbundled loops are available in all 27 wire centers within the MSA and DS1 unbundled loops are available in all wire centers except Seattle Main. The QSI study demonstrates that even in *TRRO* non-impaired wire centers, CLECs are using 2-wire unbundled loops configured into bonded pairs and that they are multiplexing them onto higher bandwidth facilities for the provision of broadband. Today, CLECs can purchase DS0 unbundled loops from their interconnection agreements in all Phoenix and Seattle wire centers. By configuring their networks in this manner, they are able to obtain the functionality of a DS1 unbundled loop at a fraction of the cost which demonstrates the fallacy of any lease cost-based price squeeze arguments.

The analysis on page 18 of QSI's study attempts to demonstrate that current available combinations of special access facilities and unbundled network elements are priced many times higher than a QSI-defined mixture of "new" unbundled elements (for which there is no retail analog). QSI calculates a ratio of the "Currently Available" leased element prices to the alleged "Cost-based prices" for new elements. This analysis is fatally flawed. First, as described above,

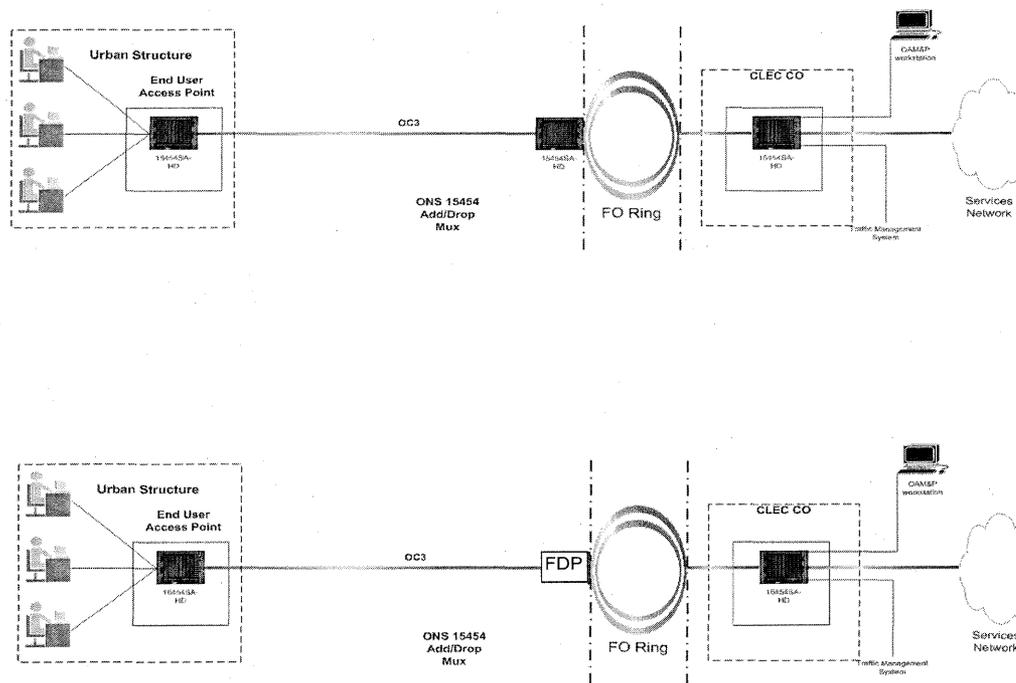
for the “Currently Available” leased elements column, QSI does not use the correct tariffed or Interconnection agreement rates. Second, the “Cost-based but Not Available” column identifies costs for a service configuration (Fractional DS3) that does not exist as a resale or wholesale product. The QSI analysis separates out a 5 Mbps bit stream (which is the equivalent of a little more than 3 DS1’s) from a full DS3 45 Mbps service (28 DS1’s). Even assuming that the cost of a fractionalized 5Mbps bit stream is  $5/45^{\text{th}}$  the cost of a DS3 loop, the “Cost-based but Not Available” column is slightly higher than the “Currently Available” leased rates when the OC3 transport (no longer available as a UNE) is included at the last UNE price point. Thus, if QSI were to use the correct special access and/or UNE rates for this comparison, the analysis would show that special access is actually comparable in price to the DS3 UNE loop plus OC-3 UNE transport price used in their scenario; not three to five times higher as portrayed in their table. Therefore, QSI’s conclusions that a price squeeze precludes CLECs from broadband markets are based on false information, and represent a very shoddy analysis.

**C. QSI’s Flawed Network Modeling Understates The Real Cost Of CLEC Self-Provisioning.**

The QSI study examines the “economic feasibility” of extending a CLEC network in terms of the relationship between the incremental costs of serving additional customers and the associated incremental revenues, which are defined as the anticipated revenues of the newly-connected customers at the prevailing market prices for the services the customers buy. While the framework that QSI provides is an accepted method for determining the economic viability of projects, QSI provides very limited data for examination to determine the validity of its study. After examining the limited data provided by QSI, one can determine that the study is flawed and the results are not indicative of an analysis of real world incremental costs of extending a CLEC network.

The flaws in the study can be grouped into four areas: 1) network architecture; 2) equipment and construction costs; 3) the flawed development of cost from investment through the use of annual charge factors and shared and common cost factors; and 4) the comparison of cost per unit and revenue per unit. These critical flaws result in an estimate of self provisioning costs that is highly overstated.

First, the architecture presented by QSI for serving a single building location, with one or more customers at the location purchasing service is flawed. In this configuration, identified in the top half of the diagram below, QSI models an Add/Drop MUX ring node (Cisco ONS 15454SA-HD) and a Terminal Node (Cisco 15454SA-HD) at the customer premise. However, if only a single building is being served on a single fiber lateral, the Add/Drop Mux ring node can be eliminated and replaced with a fiber distribution panel (fiber cross connect panel) where two ring fibers are connected to the fiber lateral. This is reflected in the bottom half of the diagram below. Changing the architecture to reflect the removal of the ring node equipment greatly reduces the investment that would need to be recovered from customers at a single building.



The second major flaw in the QSI study relates to the construction cost of the fiber laterals and the cost of the Cisco equipment. QSI uses a Gates Foundation study for its \$26 per foot cost for placing a fiber lateral. However, other means of placing fiber are available to CLECs that do not involve construction activities. For example, Qwest offers, when available, innerduct and microduct to CLECs in its 14-state ILEC region, at prices between \$0.13 and \$0.50 per foot per year. While the innerduct and microduct may not be available in all situations, when it is available it can certainly be used to reduce the cost of placing fiber laterals to a small fraction of the \$26 per foot that QSI uses exclusively in their study. In addition, QSI does not provide any equipment price data for the Cisco equipment utilized in their study. Multiple vendors provide carrier-grade equipment with the same functionality as the Cisco equipment. However, QSI does not indicate that they have examined the equipment market in order to

demonstrate that the Cisco prices used by their model indeed reflect the least-cost currently available technology.

The third major flaw of the QSI study relates to the application of annual charge factors and shared and common cost factors. The QSI study applies annual charge factors (ACFs) of 30 percent for fiber investments and 40 percent for electronic equipment to account for capital carrying costs, maintenance, and allocation of plant nonspecific expenses such as Network Engineering and Network Operations. As part of the justification for these ACFs, QSI points to data from a 2006 Qwest UNE cost case in Minnesota, where QSI represents that Qwest's ACF for electronics was over 47 percent. Unfortunately, QSI's calculation is mathematically flawed because it adds the individual factors together and ignores the fact that some of the factors are applied to investment accounts, while other factors are applied to costs. Because the bases are different, the factors cannot be added to provide an accurate ACF. The actual ACFs that QSI is attempting to calculate from the Minnesota cost study are 24.8 percent for electronic equipment and 16.9 percent for fiber investments. The result of this mathematical mistake is to greatly overstate the estimated direct monthly costs incurred by a CLEC for extending its network. The ACFs used by QSI result in monthly cost for fiber that are over 1.7 times higher and electronic costs that are 1.6 times higher than they would be if they had used the correct ACFs from the Minnesota Qwest study.

QSI also applied a factor of 35 percent to add CLEC shared and common costs to the incremental direct costs of adding customers to the CLEC network. In this case, QSI did not look to Qwest's studies in the 2006 Minnesota UNE cost case for justification of the factor. In the Qwest studies in the 2006 Minnesota UNE case, the factor for adding shared and common cost was 10.4 percent -- less than one-third of the factor applied by QSI. Thus, QSI assumes that

CLECs have a disproportionately large amount of shared and common costs for their operations. There is no basis for applying such a high common cost factor, unless QSI believes that the CLEC operations are exceptionally inefficient, with bloated overheads. Again the result of QSI's use of a 35 percent factor is to grossly overstate shared and common cost for a reasonably efficient CLEC's operations.

The fourth major flaw in the QSI study relates to its comparison of cost and revenue. QSI inappropriately reduces the expected revenue by 17 percent to account for a CLEC's retail marketing cost. This reduced revenue is then compared to a fully allocated cost that is (over-inflated for the reasons stated above). QSI's comparison assumes that every customer must cover an equal share of marketing, shared, and common costs. This is not how competitive economic markets work, as some customers of any product in any market provide a higher proportion of contribution than other customers; the level of contribution cannot be assumed to be uniform.

A more appropriate comparison of the incremental cost and incremental revenue is to compare the direct costs of extending the network exclusive of marketing, shared, and common costs, with the total revenues gained from the extension of service. This demonstrates whether the extension to a customer(s) provides a positive contribution to the recovery of marketing, shared, and common costs. That is, when a CLEC is deciding whether to build to a site, it would need to compare the potential future incremental revenues it could obtain with the incremental cost of building the extension -- absent any allocation of shared, common and marketing costs. This method -- not the QSI method -- should be used to determine whether the network extension is economically viable.

Given that fiber facilities currently extend to less than twenty percent of the nation's business locations,<sup>57</sup> it is apparent that not only CLECs, but ILECs as well, must make economic evaluations of whether to extend facilities to business locations without fiber connectivity. The costs faced by both ILECs and CLECs in extending fiber facilities are indistinguishable. Both ILEC and CLEC face high costs of placing underground or buried plant in urban environments; both ILEC and CLEC face high costs of placing electronics to small groupings of customers; and both ILEC and CLEC would need to undertake the risks associated with recovering fixed investments over the long term, at a time when customers have choice and the ability to switch to other facility-based providers of small business services. Risks are associated with the deployment of fiber investments and the CLECs should not be shielded from these risks by forcing the unbundling of fiber facilities by the ILEC. In the *TRO*, the Commission recognized the risks inherent in building next generation facilities, and determined that ILEC fiber and hybrid loops need not be unbundled, so that ILECs would have the incentive to engage in building new fiber facilities. As demonstrated elsewhere in Qwest's initial and reply comments, the Commission's predictive judgment has been borne out, as ILECs have invested heavily in fiber facilities. Requiring the unbundling of fiber and hybrid loops would stifle future investment in these facilities -- by both the ILECs and CLECs. Ultimately, forcing the unbundling of ILEC fiber facilities will lead to fewer network choices for small business customers, not more choices.

## **VI. CONCLUSION**

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

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<sup>57</sup> XO Feb. 12 *ex parte* at 2.

Respectfully submitted,

QWEST COMMUNICATIONS  
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Its Attorneys

February 22, 2010

# **EXHIBIT A**

## Fairfax Radiological Consultants, P.C. (FRC)

Fairfax, Virginia

### Services:

Cox Transparent LAN

### SITUATION:

When dealing with X-rays, MRI and CT scans and other radiological services, speed is critical. Nobody knows this better than Fairfax Radiological Consultants (FRC), the largest full-service radiology physician practice in the Washington, D.C. metropolitan area as well as the Commonwealth of Virginia. Its board-certified radiologists specialize in mammography, ultrasound, interventional radiology, CT and MRI scanning, nuclear medicine, diagnostic X-ray, pediatric imaging and other radiological services. In addition, the company employs over 500 professionals, registered technologists and support personnel.

FRC works with three major area hospitals, and owns and operates 14 outpatient facilities in the Northern Virginia area. The company had been using a courier service to pick up and drop off images and X-rays to its outpatient facilities, but that method was becoming inefficient and outdated.

"We were about to implement Picture Archiving Communications (PAC), a brand-new technology system that would enable us to move data versus physicians or film from one center to another. This would allow patients to go to the facility closest to their homes, and would also greatly reduce turnaround time for study results," said Rick R. Arnold, FRC's Senior Director of Information Technology. "But we needed greater network bandwidth to move large digital image files more quickly." Unfortunately, FRC's current network service provider was not up to the challenge.

### SOLUTION:

FRC had been researching network options for several years with no success. Fortunately for us, many of FRC's radiologists and employees were already using Cox for their residential communications services, and were impressed with our capabilities and customer support. So when Cox Business Services approached FRC to discuss its needs, Arnold was interested.

After discussing PAC and further understanding FRC's data communications needs, we recommended installing Cox Transparent LAN powered by CISCO for added bandwidth and

speed. The Cisco Powered Network designation provides the assurance that the Cox Transparent LAN service meets the most stringent standards for network reliability and performance. Arnold agreed. "We chose Cox because they were cost-effective and reliable," he said. "Their optical transparent LAN service was exactly what we needed."

But what really clinched the deal was Arnold and his team's visit to our Springfield Systems Operations and Data Center, where they saw our network operating with the necessary mechanisms in place to carefully and proactively monitor the network, something Arnold's current provider did not have.

### RESULTS:

FRC networked 10 of its 14 Fairfax County offices together using Cox Transparent LAN service, and Arnold is more than pleased with the results. The radiologists have improved their service delivery and turnaround times and are more readily available for consultations and image review. Urgent medical issues are now identified and diagnosed more quickly, as a result of implementing PACS and switching to Cox. Both changes have resulted in more effective patient treatment. Plus, the company has saved money by reducing its current film, courier and delivery charges.

"With Cox Business Services, the amount of data we get from our network in a short period of time is amazing," Arnold said. "This helped us build more efficiencies, which helped reduce costs while improving patients' medical services."

"Having a reliable service provider is essential to our business," he continued. "I would definitely recommend Cox Business Services to any business that faces a similar challenge of transmitting sensitive data quickly across multiple locations or facilities."



CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-223; 2) served on the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission at [CPDcopies@fcc.gov](mailto:CPDcopies@fcc.gov); and 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpweb.com](mailto:fcc@bcpweb.com).

/s/ Richard Grozier

February 22, 2010

