

April 7, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

Yesterday, representatives from the Telecommunications Industry Association (“TIA”) and several of its member companies, as well as the undersigned, met with Commission personnel to discuss the above-referenced petition. Specifically:

- Rebecca Schwartz of TIA, Timothy Regan of Corning Inc., Doug Cooper of OneChip Photonics Inc., Paul Kenefick of Alcatel-Lucent, and the undersigned met with Priya Aiyar, Legal Advisor to Chairman Genachowski.
- Ms. Schwartz, Mr. Regan, Mr. Cooper, Mr. Kenefick and the undersigned met with Jennifer Schneider, Senior Policy Advisor and Legal Advisor to Commissioner Copps.
- Ms. Schwartz, Mr. Regan, Mr. Cooper, and the undersigned met with Christine Kurth, Policy Director & Wireline Counsel to Commissioner McDowell.
- Ms. Schwartz, Mr. Regan, Mr. Cooper, Mr. Kenefick and the undersigned met with Angela Kronenberg, Acting Legal Advisor to Commissioner Clyburn.
- Ms. Schwartz, Mr. Regan, Mr. Cooper, Mr. Kenefick and the undersigned met with Cathy Seidel, Marcus Maher, Bill Dever, Al Lewis, Ian Dillner, and Heather Hendrickson of the Wireline Competition Bureau.

WILKINSON) BARKER) KNAUER) LLP

Marlene H. Dortch, Secretary

April 7, 2010

Page 2

At each of these meetings, TIA discussed the points set out in the attached presentation, which was provided to all meeting participants.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Russell P. Hanser". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Russell P. Hanser

Encl.

cc (via electronic mail):

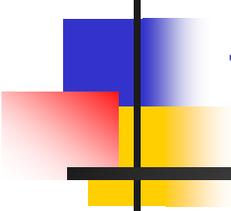
Priya Aiyar
Jennifer Schneider
Christine Kurth
Angela Kronenberg
Cathy Seidel
Marcus Maher
Bill Dever
Al Lewis
Ian Dillner
Heather Hendrickson



www.tiaonline.org

10 G Street, NE, Suite 550
Washington, DC 20002

Tel: +1.202.346.3240
Fax: +1.202.346.3241

A decorative graphic consisting of a vertical black line intersected by a horizontal black line. To the left of the intersection are three overlapping squares: a blue one on top, a red one on the left, and a yellow one on the bottom.

Telecommunications Industry Association

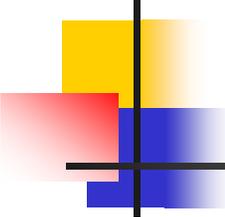
Cbeyond's Fiber Unbundling Petition WC Docket No. 09-223



www.tiaonline.org

10 G Street, NE, Suite 550
Washington, DC 20002

Tel: +1.202.346.3240
Fax: +1.202.346.3241

A decorative graphic consisting of overlapping colored squares (yellow, red, blue) and a black crosshair.

Who We Are

- Leading trade association in support of information and communications technology (ICT)
 - Approx. 500 member companies
- Shared goals with FCC
 - Drive broadband deployment
 - Facilitate spread of ICT
- Backbone of broadband industry
 - Supply products and services used in provision of broadband and broadband-enabled applications



The Historical Background

- *TRO* (2003): Citing vast revenue opportunities and prospects for competitive deployment, effectively eliminates FTTx unbundling.
- *USTA II* (2004): Upholds FTTx decisions, citing deployment incentives.
- *MDU Order/FTTC Recon Order* (2004): Extend relief to FTTC (within 500 feet), MDUs.
- *Broadband 271 Order* (2004): Eliminates 271 access requirement, recognizing that even access at “just and reasonable” rates undermines deployment.
- *TRRO* (2005): Adopts “nuanced,” “granular” approach to DS1, DS3 loop unbundling; upheld by D.C. Circuit’s *Covad* decision in 2006.



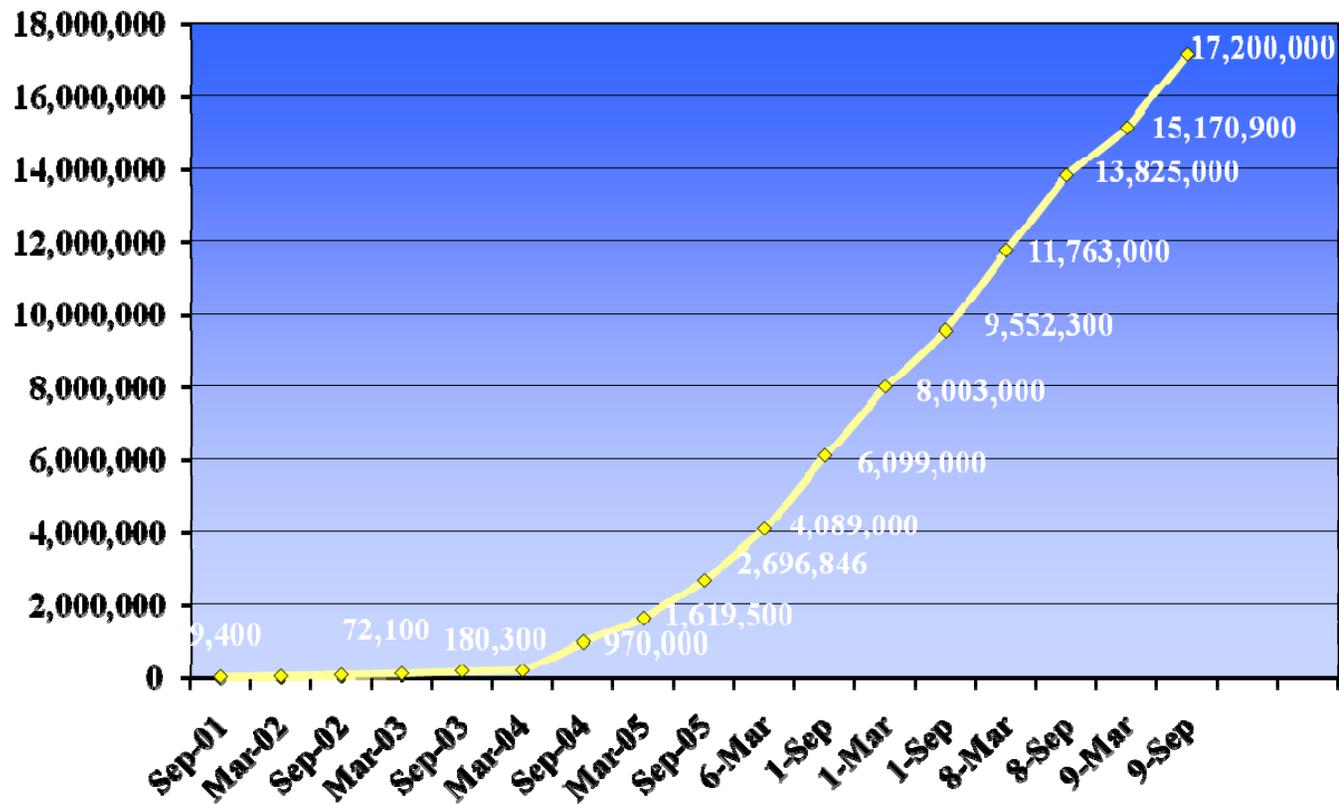
Current Policies Are Working

- Investment in broadband facilities has skyrocketed, confirming the premises behind the FCC's unbundling orders.
 - Broadband providers have made more than \$166.5 billion in capital expenditures between 2007 and 3Q2009.
 - NBP at 18: 10 largest providers' combined annual capex investments >\$50B.
 - NBP at 38: Cable and telcos' capex was about \$48B in 2008, about \$40B in 2009.
 - NBP at 40: Wireless capex about \$21B in 2008 (\$10B for broadband); \$21B in 2009 (\$12B for broadband); expenditures expected to be about \$12 billion in 2010 and increase to \$15 billion in 2015.



FTTH Leads the Way (1)

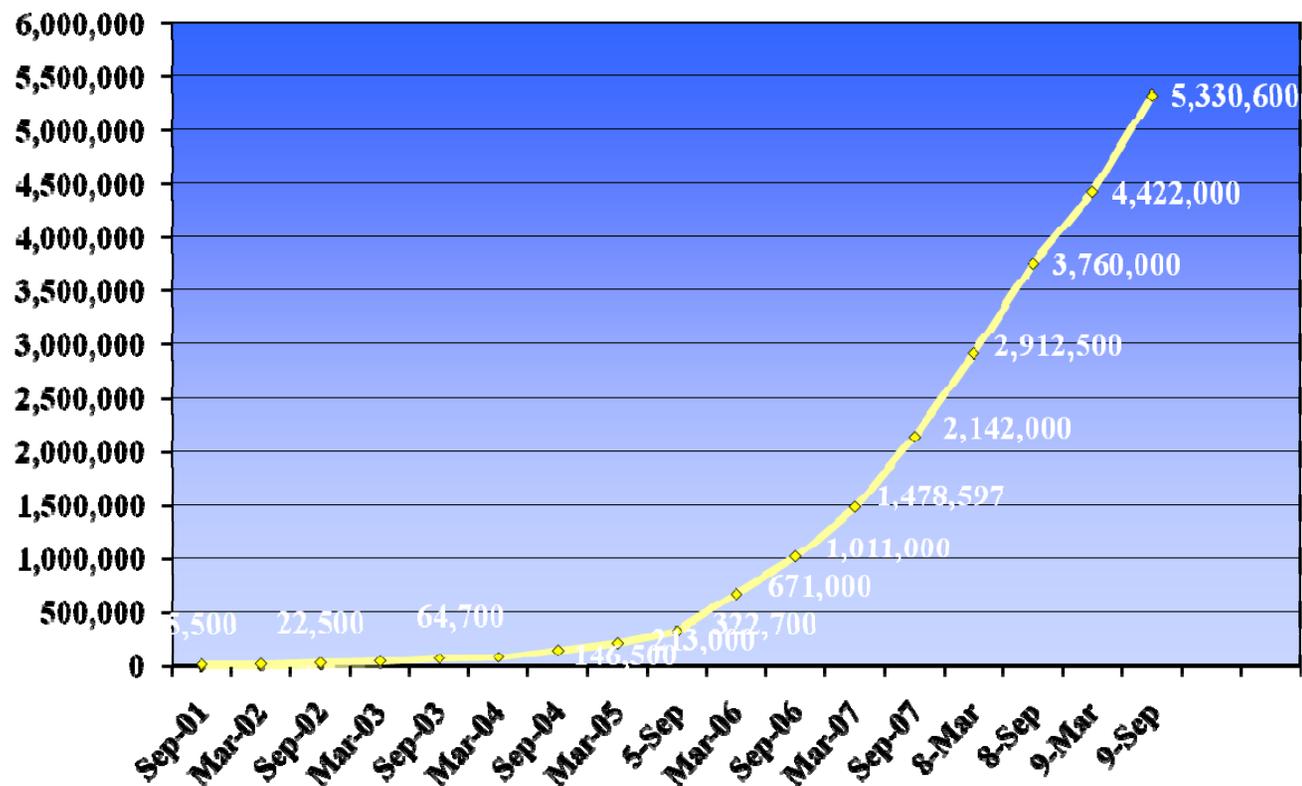
Homes Passed, North America





FTTH Leads the Way (2)

Homes Connected, North America





Cbeyond's Policy-Based Arguments Fail

- FTTx deployments accelerated exponentially following deregulation.
- Studies confirm link between deployment and deregulation.
- Berkman Study does not show otherwise.
 - Fails to address, much less rebut, numerous studies reaching contrary conclusions.
 - Fails to recognize that US, unlike many nations, enjoys multi-platform broadband competition (as acknowledged in NBP).
 - Fails to account for massive public investment in other nations' broadband infrastructures.
 - Understates role of budding facilities-based competition where it exists (e.g., NTT Comments).
- ETI Study does not show otherwise.
 - Treats "telecom bubble" era as the baseline for comparison.
 - Claims of "disinvestment" simply incompatible with broadband growth.
 - Focuses on traditional wireline plant, not accounting for line loss.
 - Fails to recognize increasing capacity/\$ over time.



Outcome Sought is Unlawful (1)

- Petition ignores the section 251(d)(2) impairment standard.
 - D.C. Circuit: Congress “made ‘impairment’ the touchstone.”
- Courts have repeatedly emphasized the costs inherent in unbundling, and have carefully limited its lawful use.
 - “An unbundling requirement ... seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [facilities] and ILECs fearful that CLEC access would undermine the investments’ potential return.” In contrast, the “[a]bsence of unbundling” will “give all parties an incentive to take a shot at [a] potentially lucrative market.”
- The courts have *upheld* rules regarding FTTx and DS1/DS3 loop unbundling.



Outcome Sought is Unlawful (2)

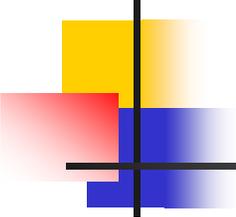
- Three critical legal flaws in Cbeyond's request:
 - No basis for rejecting FCC's previous determinations that "carriers will be able to earn a substantially greater return on their FTTH investment by offering voice, data, video, and other services," and that these returns permit self-deployment. *See TRO ¶¶ 274-78.*
 - Petition unlawfully relies on Cbeyond's specific business plan, not economics of deployment more broadly, in direct contravention of *TRO* and *TRRO*. *See TRRO ¶¶ 25-26.*
 - Claim that unbundling needs arise from heightened capacity requirements flouts long-standing precedent holding that increased capacity → increased revenue opportunities → increased prospects for self-deployment. *See TRO ¶ 84, TRRO ¶ 24.*



www.tiaonline.org

10 G Street, NE, Suite 550
Washington, DC 20002

Tel: +1.202.346.3240
Fax: +1.202.346.3241

A decorative graphic on the left side of the slide consists of overlapping colored squares (yellow, red, blue) and a black crosshair.

Rebecca Schwartz,
Director, Regulatory and Government
Affairs, TIA
202-346-3248/ rschwartz@tiaonline.org