

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Wireline Bureau Seeks Comment on Business Broadband Marketplace)	WC Docket No. 10-188
)	
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 <i>Ex Parte Presentation</i>
)	
Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B))	WC Docket No. 09-222 <i>Ex Parte Presentation</i>
)	
Policies and Rules Governing Retirement of Copper Loops By Incumbent Local Exchange Carriers)	RM-11358 (consolidated) <i>Ex Parte Presentation</i>
)	
Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. For a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirements of Copper Loops and Copper Subloops)	

REPLY COMMENTS OF PAETEC HOLDING CORP.

Andrew D. Lipman
Russell M. Blau
Philip J. Macres
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
Tel: 202-373-6000
Fax: 202-373-6001
Email: andrew.lipman@bingham.com

William A. Haas
Vice President of Public Policy and Regulatory
PAETEC
1 Martha's Way
Hiawatha, IA 52233
Tel: (319) 790-7295
Fax: (319) 790-7901
Email: william.haas@paetec.com

Email: russell.blau@bingham.com
Email: philip.macres@bingham.com

Counsel for PAETEC Holding Corp.

Date: November 4, 2010

I.	INTRODUCTION AND SUMMARY	2
II.	THE SMALL-TO-MEDIUM-SIZE BUSINESS BROADBAND WIRELINE MARKETPLACE IS FAR FROM BEING “ROBUSTLY” AND “INTENSELY” COMPETITIVE.....	4
A.	Retail Competitors in the Small-to-Medium-Size Business Marketplace Need Wholesale Access to ILEC Last-Mile Broadband Facilities at Just and Reasonable Rates, Terms and Conditions	7
1.	Retail Competitors Cannot Effectively Compete Using Overpriced ILEC Special Access Services	8
a.	Special Access services are limited to DS1 and DS3 TDM technology and do not include packet-based technology	8
b.	ILECs offer retail prices that are less than the wholesale prices for special access	9
2.	Current ILEC Section 251(c)(3) UNEs Have Significant Limita- tions.....	11
3.	Non-ILEC Wireline Wholesale Offerings to Most Small and Me- dium-Size Businesses Are Extremely Limited	14
4.	Wireless is Not a Viable Alternative	15
B.	Self-Deployment of Last-Mile Facilities to Deliver Retail Broadband Ser- vices to the Small-to-Medium-Size Business Marketplace is Not Eco- nomically Viable.....	17
III.	TO PROMOTE ROBUST RETAIL COMPETITION IN THE SMALL-TO- MEDIUM-SIZE BUSINESS BROADBAND MARKETPLACE, THE COM- MISSION SHOULD REQUIRE THAT ILECS MAKE THEIR BROADBAND- CAPABLE FIBER LOOP FACILITIES AVAILABLE ON A WHOLESALE BASIS AT JUST AND REASONABLE RATES, TERMS AND CONDITIONS.....	19
A.	Lessons Learned from Other High-Performing Countries Demonstrate that Making Fiber Loop Facilities Available on an Unbundled Basis Would Promote Broadband Penetration, Capacity and Affordability	19
1.	Berkman Report.....	19
2.	GAO Report	22
3.	Recent CRTC Decision.....	23
B.	The Commission’s Rationale for Relieving ILECs of Their Obligation to Offer Fiber Loop Facilities has Been Proven Invalid	24
1.	Deregulation has resulted in less overall investment.....	24
2.	Deregulation has led to sector job losses	27

C.	The Berkman Report Debunks the Commission’s Policy Rationale for Relieving ILECs from Offering Fiber Loop Facilities on an Unbundled Basis.....	29
1.	Investment theory debunked.....	29
2.	Intermodal competition theory debunked.....	32
3.	The Berkman Report Demonstrates that the Commission Should re-examine its unbundling policy and require ILECs to unbundle Fiber Loop Facilities.....	34
IV.	THE COMMISSION HAS THE RESPONSIBILITY AND AUTHORITY TO REVERSE COURSE IMMEDIATELY AND MANDATE UNBUNDLED ACCESS TO ILECS’ LAST-MILE FIBER LOOP FACILITIES.....	35
A.	The Commission is Charged with Ensuring U.S. Small and Medium-Size Businesses Have Access to Advanced Services, at Reasonable Prices.....	35
B.	The Commission has the Authority to Review its Prior Decisions.....	36
V.	CONCLUSION.....	37

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

)	
In the Matter of)	
)	
Wireline Bureau Seeks Comment on Business Broadband Marketplace)	WC Docket No. 10-188
)	
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 <i>Ex Parte Presentation</i>
)	
Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B))	WC Docket No. 09-222 <i>Ex Parte Presentation</i>
)	
Policies and Rules Governing Retirement of Copper Loops By Incumbent Local Exchange Carriers)	RM-11358 (consolidated) <i>Ex Parte Presentation</i>
)	
Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. For a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirements of Copper Loops and Copper Subloops)	
)	

REPLY COMMENTS OF PAETEC HOLDING CORP.

PAETEC Holding Corp., on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC and McLeodUSA Telecommunications Services, L.L.C. d/b/a PAETEC Business Services (all doing business as “PAETEC”), through its undersigned counsel, respect-

fully submits these comments in response to the Public Notice issued by the Commission in WC Docket No. 10-188.¹

I. INTRODUCTION AND SUMMARY

The Commission has repeatedly acknowledged that competition in the broadband market is critically important to the United States economy and to small businesses in particular.² This much-needed competition is lacking in the still highly concentrated retail small-to-medium-size business broadband wireline marketplace. The Incumbent Local Exchange Carrier (“ILEC”) remains the only ubiquitous broadband provider delivering service using high capacity facilities throughout the nation. Typically, the incumbent cable operator is an ILEC’s only competitor that now provides, or hopes soon to provide, retail broadband service to small and medium-size business customers over its own last-mile network to any significant extent. However, many cable providers continue to rely on cable modem as a broadband platform to serve a significant portion of its business customer base. At best, retail small and medium-size business customers effectively face a duopoly for these broadband services, and a monopoly environment when businesses want to use high capacity broadband connections offering meaningful service quality assurances.

For a number of reasons, to effectively compete, retail competitors in this marketplace need wholesale access to ILEC last-mile broadband facilities at just and reasonable rates, terms and conditions. The ILECs’ overpriced special access services, which are predominantly limited to DS1 and DS3 TDM technology and do not include packet-based technology, do not support

¹ *Wireline Competition Bureau Seeks Comment on Business Broadband Marketplace*, WC Docket No. 10-188, Public Notice, DA 10-1743 (rel. Sep. 15, 2010) (“*Public Notice*”). These Reply Comments are also being filed as *ex parte* presentations in certain other Commission proceedings (as noted in the caption to these Reply Comments) to the extent that the subject matter discussed herein addresses issues under consideration in these other dockets.

² *See, e.g.*, Prepared Remarks of Chairman Julius Genachowski, FCC, “Broadband: Our Enduring Engine for Prosperity and Opportunity,” NARUC Conference, Washington, D.C., at 2-3 (Feb. 16, 2010) (“Chairman Genachowski NARUC Remarks”) (noting “that even modest increases in broadband adoption can yield hundreds of thousands of new jobs” and that “[b]roadband allows small business to think big and grow bigger”).

effective long-term retail competition. Nor do ILECs' existing Section 251(c)(3) UNEs. Such UNEs do not include packetized bandwidth of hybrid fiber-copper loops along with fiber-to-the-home and fiber-to-the curb loops (herein jointly referred to as "Fiber Loop Facilities"). Consequently, because competitors like PAETEC are precluded from accessing these facilities, they are unable to roll-out competitive and cutting edge IT applications to small and medium-size customers that require far more than a DS1 worth of capacity. Moreover, copper loop UNEs, while a temporary alternative to the extent available, have certain technical limitations that render them non-viable to serve a significant portion of small and medium-size business locations. In addition, the Commission's current copper retirement rules do not adequately protect copper facilities that CLECs may want to use prospectively, and hardly protect copper facilities CLECs are using when a ILEC unilaterally decides to retire the facilities. Moreover, due to various shortcomings, fixed wireless is not a viable alternative to the wireline broadband services that small and medium-size customers demand. Nor is self-deployment of facilities a viable alternative. Indeed, where UNEs are not available, it is "cost-prohibitive and economically non-viable" for a CLEC to self-provision last-mile facilities and justify competitive entry in order to offer broadband services to a small or medium-size business customer.

Given the extremely limited availability of non-ILEC wholesale options, the ability of PAETEC and other CLECs to serve new small or medium-size business customers is almost entirely dependent upon the use of ILEC facilities for end-user connections. Consequently, "competition in the retail broadband market cannot be sustained – much less expanded – if a critical broadband service input continues to be available only at monopoly rates and terms."³

The Commission's efforts in fulfilling its obligation to ensure small and medium-size businesses have access to reasonably-priced advanced services are undermined by its current unbundling policy that continues to hinder the development of the broadband market in the United States. Recent studies outlined herein reveal the fallacy of the Commission's earlier

³ Sprint Comments at 3.

interrelated investment and intermodal competition theories for limiting unbundling. The evidence confirms that fair open access regulation does not deter network investment, and that firms relying primarily on intermodal competition offer the highest prices and the lowest speeds, while firms in countries that have robust unbundling offer the highest speeds and the lowest prices.

Accordingly, the United States continues to fall behind other industrialized market economies in benefitting from competitive broadband services because it is cost-prohibitive for CLECs to duplicate embedded incumbent networks. As multiple studies outlined herein demonstrate, access to unbundled Fiber Loop Facilities would promote broadband penetration, capacity and affordability. The Commission should therefore take pro-competitive steps to facilitate wholesale access to Fiber Loop Facilities at just and reasonable rates, terms and conditions for retail competitors in the small-to-medium-size business marketplace. Given the Commission's broad authority to re-orient unbundling guidelines to correct the failures of the last decade's broadband policy, it should not hesitate to do so.

II. THE SMALL-TO-MEDIUM-SIZE BUSINESS BROADBAND WIRELINE MARKETPLACE IS FAR FROM BEING “ROBUSTLY” AND “INTENSELY” COMPETITIVE

AT&T asserts that there is intense competition to serve retail customers in the small and medium-size business broadband wireline market.⁴ Verizon asserts that “[r]egardless of where the Commission looks along the continuum of business customers or business broadband services, however, it will find robust and growing competition and investment.”⁵

Contrary to Verizon's and AT&T's assertions, the retail small-to-medium-size business broadband wireline marketplace is not robustly competitive, but rather highly concentrated

⁴ Comments of AT&T Inc. (“AT&T Comments”) at 20. Unless stated otherwise, cites included herein are to comments filed by the referenced party on October 15, 2010 in this proceeding.

⁵ Comments of Verizon and Verizon Wireless (“Verizon Comments”) at 2.

throughout the nation. The ILEC remains the only ubiquitous broadband provider delivering service using high capacity facilities within a particular serving area. Typically, the incumbent cable operator is an ILEC's only competitor that now provides, or hopes soon to provide, retail broadband service to small and medium-size business customers over its own last-mile network to any significant extent. However, many cable providers continue to rely on cable modem as a broadband platform to serve a significant portion of its business customer base. At best, retail small and medium-size business customers effectively face a duopoly for these broadband services, and a monopoly environment when businesses want to use high capacity broadband connections offering meaningful service quality assurances. Although Verizon and AT&T assert there are several other providers that serve some small and medium-size business customers, these are "fringe"⁶ competitors that are able to compete only by relying extensively on Unbundled Network Elements ("UNEs") provisioned pursuant to 47 U.S.C. § 251(c)(3) and other ILEC wholesale services to the extent they are available.

Evidence of facilities-based competition is highly relevant to determining whether competition is sufficient at the retail level for small and medium-size businesses, and end-to-end facilities-based coverage should be a leading factor in making this determination. Nothing in the record suggests, however, that any wireline providers other than incumbent cable operators in their relatively limited roll out of non-cable modem connections have last-mile network facilities coverage to any significant degree. To the contrary, as discussed above, other competitors are

⁶ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 at n.241 (rel. June 22, 2010) ("*Qwest Phoenix Forbearance Order*") (explaining that "[a] fringe competitor is a small firm operating in a market that is dominated by a single firm or a few firms. The fringe competitors take the price set by the dominant firm(s) as given and maximize their profits given this price") (*citing, e.g.,* Noel D. Uri, *THE ECONOMICS OF TELECOMMUNICATIONS SYSTEMS* at 148–49 (Nova Science Publishers, Inc. 2004)).

dependent on the ILEC's last-mile facilities, including UNE loops, special access circuits and other ILEC wholesale services to the extent they are available, to serve small and medium-size business customers.

Accordingly, as discussed below, retail competitors in the small-to-medium-size business marketplace need to be able to access ILEC last-mile IP-based broadband facilities, *i.e.*, packetized bandwidth of hybrid fiber-copper loops along with fiber-to-the home ("FTTH") and fiber-to-the curb ("FTTC") loops (herein jointly referred to as "Fiber Loop Facilities"), on a wholesale basis at just and reasonable rates, terms and conditions. While ILECs assert otherwise, the notion of the "potential for competitive entry" via supply-side substitution is unlikely. Other than incumbent cable operators, there are extremely few, if any, potential facilities-based competitors that can ubiquitously serve the small-to-medium-size business broadband wireline marketplace or offer facilities on a wholesale basis that serve these retail customers. Although the leading mobile wireless providers have ubiquitous networks, their services do not fall within the same relevant product markets as wireline broadband services.⁷ Nor is there evidence that *fixed* wireless providers are likely to enter and offer enterprise services to any significant portion of small and medium-size businesses anytime in the future.⁸

Moreover, the possibility of *de novo* facilities-based entry to provision broadband services to small and medium-size businesses remains unviable. In the *Triennial Review Order*, the Commission found that competitive carriers face extensive economic barriers to the construction of last-mile facilities.⁹ Congress enacted, and the Commission implemented, the UNE framework

⁷ See *Qwest Phoenix Forbearance Order*, ¶ 90.

⁸ See, *e.g.*, *id.*

⁹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC

in an attempt to lower barriers to entry, and to create a viable platform for entry into the local market. As demonstrated below, there is no evidence to suggest that these barriers have been sufficiently reduced since passage of the 1996 Act to prompt more facilities-based broadband competition in the small-to-medium-size business marketplace. As the Commission previously concluded, “in short, cable operators may have faced comparatively lower barriers to entering telecommunications services markets because they owned existing cable networks that could be upgraded at a feasible incremental cost, but this does not imply that entry barriers for other competitive LECs have eased.”¹⁰

A. Retail Competitors in the Small-to-Medium-Size Business Marketplace Need Wholesale Access to ILEC Last-Mile Broadband Facilities at Just and Reasonable Rates, Terms and Conditions

Retail competitors require just and reasonable wholesale access to ILEC last-mile IP-based broadband facilities in order to compete effectively now and into the future in the small-to-medium-size business broadband marketplace, especially given the shift from TDM to IP-based services.¹¹ As PAETEC has previously explained, to remain competitive, PAETEC cannot charge a value-added premium for Internet connectivity and MPLS WAN services because they

Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 85-91 (2003) (“*Triennial Review Order*”), corrected by Triennial Review Order Errata, 18 FCC Rcd at 19020 (subsequent history omitted); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, ¶¶ 149-54 (2005) (“*Triennial Review Remand Order*”) (discussing barriers to entry for high-capacity loops).

¹⁰ *Qwest Phoenix Forbearance Order*, ¶ 85. While the Commission recognized that, “in a small number of geographic markets, cable over-builders such as RCN have entered the market,” the extent of this entry has been limited. *Id.* Nor is there any evidence that a *de novo* entrant is likely to construct a network, and the theoretical possibility of such occurrence is not sufficient. *Id.*

¹¹ Comments of PAETEC Holding Corp. (“PAETEC Comments”) at 2.

have become highly commoditized since 2006.¹² Consequently, this places increasing importance on the need for PAETEC to have access to high-bandwidth circuits on a wholesale basis at cost-based rates to small and medium-size business customers. Currently, PAETEC relies on leased facilities for more than 97 percent of its last-mile facilities use, the majority of which are special access circuits that PAETEC obtains from ILECs.¹³ Given the limited availability of alternative offerings, XO Communications, LLC is also a “captive customer[.]” for ILECs’ special access services.¹⁴ However, as demonstrated below, the ILECs’ special access and UNE offerings are not suitable long-term wholesale options, nor are other non-ILEC wholesale alternatives viable options to serve small and medium-size businesses.

1. Retail Competitors Cannot Effectively Compete Using Overpriced ILEC Special Access Services

a. Special Access services are limited to DS1 and DS3 TDM technology and do not include packet-based technology

In the most densely populated areas of the United States, special access services offered by Bell Operating Companies (“BOCs”) and certain other ILECs generally only include TDM-based DS1 and DS3 services.¹⁵ These ILECs are basically no longer required to offer broadband

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ Comments of XO Communications, LLC (“XO Comments”) at 7.

¹⁵ *See, e.g.,* Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006), *review denied*, *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007); Petition of the Verizon Telephone Companies For Forbearance, WC Docket No. 04-440 (filed Dec. 20, 2004); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶ 12 (2007) (“*AT&T Fiber and Packet Services Forbearance Order*”) (subsequent history omitted); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Applica-*

services as special access services “with regard to (1) [their] existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) [their] existing non-TDM-based, optical transmission services. These services include Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services.”¹⁶

Given this, special access services are not designed to accommodate the following two business broadband market trends PAETEC has observed: (1) a growing shift from TDM to IP services; and (2) a shift from lower value-add (i.e. Internet connectivity) and/or legacy WAN services (i.e. frame relay) to IP-based WAN and Cloud services.¹⁷ Both AT&T and Verizon acknowledge that one of most significant trends in this marketplace is the move away from TDM-based services.¹⁸

b. ILECs offer retail prices that are less than the wholesale prices for special access

Apart from these trends and TDM limitations of special access service offerings, PAETEC has explained that deregulated wholesale prices offered to PAETEC by both cable companies and ILECs typically exceed the retail prices these companies are offering to end users

tion of Computer Inquiry Rules and Certain Title II Common-Carriage Requirements, Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, ¶ 12 (2007) (granting in part Embarq’s and Frontier/Citizen’s requests for forbearance relief comparable to the relief granted Verizon through operation of law) (subsequent history omitted); Qwest Petition for Forbearance Under 47 USC Section 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, 23 FCC Rcd 12260, ¶ 13 (2008).

¹⁶ See, e.g., *AT&T Fiber and Packet Services Forbearance Order*, ¶ 13.

¹⁷ PAETEC Comments at 2.

¹⁸ AT&T Comments at 22; Verizon Comments at n.85 (*citing* IDC, U.S. SMB Telecom Voice and Data Services 2010-2013 Forecast, Doc #224295, Aug. 2010, at 20 (noting “rapidly unfolding transition from legacy TDM technology to IP-based services”)).

located in the same premises, making it virtually impossible to compete in such circumstances using deregulated wholesale inputs.¹⁹ Moreover, the ILECs' prices for special access services are at levels that do not allow PAETEC or other CLECs to meaningfully compete using these services. For this reason, PAETEC is converting more facilities to cost-based Section 251(c)(3) UNEs.²⁰

The record indicates the special access pricing problems cannot be overstated. As Sprint explained, "the RBOCs' near-monopoly in the wholesale special access market has had and is continuing to have a deleterious impact on the competitiveness of the retail broadband market."²¹ The real-world examples Sprint provided demonstrate that AT&T and Verizon frequently underbid Sprint in the highly competitive *retail* business market purely as a result of the inflated special access rates Sprint is forced to pay primarily to AT&T, Verizon and other ILECs.²² Moreover, these examples show that the retail access prices offered by AT&T and Verizon's ILECs to business end users were substantially below the wholesale access price offered to Sprint. This confirms AT&T and Verizon's ability to leverage their market power by offering inflated special access rates well above the cost of providing the service in an anticompetitive fashion.²³ As Sprint has observed, BOC affiliates "are able to under-bid Sprint by up to 20%," and therefore, "it is difficult to imagine how competition in the retail broadband market can be

¹⁹ PAETEC Comments at 10; *see also* Earthlink, Inc. and New Edge Network, Inc. Comments at 12-14.

²⁰ PAETEC Comments at 7.

²¹ Comments of Sprint Nextel Corporation ("Sprint Comments") at 3.

²² *Id.* at 4 (emphasis in original).

²³ *Id.* at 6.

sustained – much less expanded – if a critical broadband service input continues to be available only at monopoly rates and terms.”²⁴

2. Current ILEC Section 251(c)(3) UNEs Have Significant Limitations

PAETEC delivers business-class services over high-capacity networks, and seeks to make these services available to all small business customers. However, the Commission’s decisions that relieved ILECs of offering packetized bandwidth of hybrid fiber-copper loops along with FTTH and FTTC loops²⁵ have precluded competitors like PAETEC from accessing the facilities needed to rollout cutting-edge IT applications to customers that require more than DS1 capacity.

For example, DS1 services provided over § 251(c)(3) UNEs, which are the mainstay of many CLEC broadband offerings, are wholly insufficient to support next-generation broadband applications that will support the growing capacity demands of small businesses. “Best efforts” 1.544 Mbps can not support the dynamic applications that will drive job growth and investment, such as high-quality video conferencing and other tele-presence applications. DS3 UNEs are not a viable alternative because they are too expensive for the typical small business.

Other competitive providers share these sentiments. As Cbeyond *et al.* explained, “TDM [UNE] inputs cannot be relied upon to efficiently provide services at or above 6 Mbps of capacity to small and medium-size businesses.”²⁶ They noted that “it is generally economically infea-

²⁴ Sprint Comments at 3.

²⁵ See *Triennial Review Order*, ¶¶ 272-95, 541; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, ¶¶ 9-19 (2004).

²⁶ Comments of Cbeyond, Inc., Integra Telecom, Inc., MegaPath, Inc., Covad Communications Company and tw telecom inc. (“Cbeyond *et al.* Comments”) at 27.

sible for competitors to bond multiple DS1 UNE loops together in order to provide packetized services at or above 6 Mbps of capacity to small and medium-size business customers,” and that it “is also uneconomic to rely on a DS3 loop for this purpose.”²⁷

While access to conditioned copper UNE loops enables competitors to provide higher bandwidth services to some small business customers using Ethernet over First Mile Copper (“EFMC”) technology, copper loops – to the extent they are available or have not been retired – are not suitable to provision this technology to many small businesses due to distance limitations. Consequently, many small business are unable to further their interests through the use of next-generation business-class technology, but rather are relegated to relying on outmoded IT applications.

Similar issues with copper UNE loops have been raised by other competitive providers. For instance, Integra and MegaPath explained that while they have been able to use Ethernet over-Copper technology to provide higher bandwidth services to small and medium-size businesses, “they have been able to do so in only a subset of customer locations.”²⁸ They explained that “copper is unavailable in many suburban areas as a result of copper retirement or failure to maintain the copper,” and that “copper loops used to provide Ethernet-over-Copper services cannot exceed a certain length.”²⁹ Moreover, competitors such as Integra have in some cases been unable to obtain access to conditioned copper UNE loops on just and reasonable terms and

²⁷ *Id.* at 27.

²⁸ *Id.* at 26.

²⁹ Cbeyond *et al.* Comments at 26.

conditions.³⁰ Nor is reliance on copper UNE subloops in combination with remote terminal collocation a viable strategy in certain circumstances.³¹

As the Commission is well aware, in many suburban areas, copper has been removed by ILECs from locations served by fiber or otherwise has not been maintained by the ILECs.³² The Commission's existing rules fail to provide adequate protection for the future use of copper facilities and give ILECs the option to "retire" the copper loop. As discussed in the *Bridgecom et al.* Petition and *XO et al.* Petition, the Commission's copper retirement rules impose limited restrictions and fail to provide an adequate means for any substantive challenge or review of an ILEC's decision to retire critical last-mile copper facilities.³³ The current rules basically only permit limited objections by a provider currently interconnecting with the ILEC's network and, then generally only provide for additional time for the competitor to get off the facilities.³⁴ Consequently, the Commission's current copper retirement rules do not adequately protect copper facilities that CLECs may want to use prospectively, and hardly protect copper facilities CLECs are using when a ILEC unilaterally decides to retire the facilities.³⁵

³⁰ *Id.* at 32.

³¹ *Id.* at 26; *see also* QSI Consulting, Inc., *Viability of Broadband Competition in Business Markets: An Analysis of Broadband Network Unbundling Policies and CLEC Broadband Competition*, at 21 (Jan. 21, 2010), attached as Exhibit A to Comments of Covad Communications Company, WC Docket No. 09-223 (filed Jan. 22, 2010) ("QSI Report").

³² *Cbeyond et al.* Comments at 26.

³³ *See* BridgeCom International, Inc. *et al.*, Petition for Rulemaking and Clarification, RM-11358 (Jan. 18, 2007) ("*BridgeCom et al.* Petition"); *XO Communications, LLC et al.*, Petition for Rulemaking, RM-11458 (Jan. 18, 2007) ("*XO et al.* Petition").

³⁴ *See also* Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 and RM-11358 at 3 (filed Dec. 7, 2009).

³⁵ *See also id.* at 2-4.

3. Non-ILEC Wireline Wholesale Offerings to Most Small and Medium-Size Businesses Are Extremely Limited

AT&T asserts that “customers of wholesale broadband services have numerous, competitive options from which to choose.”³⁶ Verizon likewise maintains “there is extensive competition” at the wholesale (*i.e.*, facilities-based) level and points to the websites of various carriers to support this proposition.³⁷ To the extent Verizon seeks to introduce evidence that competitors advertise various wholesale services on their website, the Commission has already found that such evidence wanting because it is not specific and does not distinguish between competitive services that are self-provisioned and those provided using the ILEC’s facilities.³⁸

As indicated, contrary to Verizon’s and AT&T’s assertions, customers of wholesale broadband services do not have numerous competitive options from which to choose in serving small and medium-size business customers, nor is this a competitive wholesale market. Similar to Cbeyond’s and Integra’s views, PAETEC has found that non-ILEC wholesalers, including cable companies, do not have sufficiently extensive network coverage, along with sufficiently sophisticated and reliable wholesale operations support systems, for PAETEC to rely on them as a wholesale provider of loop facilities to small and medium-size businesses in any geographic market in which PAETEC offers service. In limited situations, competitive carriers, including cable companies, have constructed their own fiber last-mile connections to key enterprise customers or buildings, and in even more limited situations appear to offer these services to

³⁶ AT&T Comments at 33 (emphasis omitted).

³⁷ Verizon Comments at 23.

³⁸ *In the Matter of Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11758 ¶ 39 n.145 (2008) (“*Qwest 4-MSA Order*”).

competitors as wholesale inputs.³⁹ Consequently, the vast majority of PAETEC's end user connections are provided by ILECs.⁴⁰ Thus, PAETEC's ability to serve a new small or medium-size business customer in a building in which PAETEC does not already have its own fiber is almost entirely dependent on its use of ILEC facilities.

4. Wireless is Not a Viable Alternative

Verizon asserts that “[w]ireless networks – both fixed and mobile – may be used to provide various broadband services to a variety of business customers, from small businesses to enterprises and carriers,” and that “numerous fixed wireless providers,” including PAETEC, “now offer fixed wireless service in areas throughout the counts using spectrums in certain bands.”⁴¹ Verizon contends that “[t]hese providers offer high-speed connections ranging from DS1 to Gigabit Ethernet to OCn, both to business customers and in some cases wholesale customers.”⁴² AT&T asserts that “[f]ixed and [m]obile [w]ireless [b]usiness [b]roadband [s]ervices [a]re [p]roliferating.”⁴³

³⁹ As PAETEC has previously explained, some cable companies offer wholesale services where they have overbuilt fiber into the business market; however, their coverage of business premises in a typical market is very low. PAETEC Comments at 9. In most markets where cable fiber facilities have been built into the business areas of a Metropolitan Service Area (“MSA”), PAETEC's experience is that a miniscule percentage of the business premises are served by alternative fiber provided by cable companies. *Id.* Moreover, even when cable companies do offer services on a wholesale basis, their prices exceed the retail prices they offer to end users located in the same premises, making it virtually impossible to compete using their wholesale inputs.

⁴⁰ See PAETEC Comments at 7.

⁴¹ Verizon Comments at 27-28.

⁴² *Id.* at 28.

⁴³ AT&T Comments at 5 (italics removed).

While business customers may use wireless for mobility applications, they do not use fixed wireless as a substitute for wireline services.⁴⁴ As PAETEC explained, wireless connectivity provides ubiquity of access, but not necessarily the data rates needed by next generation applications, particularly in business applications.⁴⁵ This is because RF signals suffer from the fundamental issue that the signal steadily weakens as the receiver gets further away from the transmitter. Even the recently released GAO Report observed that “consumers who value high download and upload speeds would not consider wireless broadband to be a substitute for wireline service.”⁴⁶ Consequently, it is unlikely that wireless technology will ever offer the same capacities as optical fiber.

The limitations of wireless platforms are evident in today’s technologies; while optonics exist that can drive multiple wavelengths over a single optical fiber at trillions of a bit per second, implementations of available wireless technologies drive a small fraction of that bandwidth with significantly higher latency.⁴⁷ Moreover, as commenting parties have explained, fixed wireless services cannot meet business needs for reliability, availability, and quality of service.⁴⁸ Furthermore, as indicated above, fixed wireless providers are unlikely to enter and offer enterprise services to any significant portion of small and medium-size businesses anytime in the

⁴⁴ While PAETEC does offer fixed wireless services, PAETEC serves a very small percentage of its end user locations via fixed wireless technology. *See* Reply Comments of PAETEC *et al.*, WC Docket No. 05-25, at n.77 & Exhibit 2 at ¶ 5 (filed Feb. 24, 2010); *see also* Ad Hoc Comments at 5 (explaining that “[a]s for wireless services, business customers use them for mobility applications rather than fixed wireless”).

⁴⁵ PAETEC Comments at 8-9.

⁴⁶ United States Government Accountability Office, Telecommunications, *National Broadband Plan Reflects Experiences of Leading Countries, but Implementation Will Be Challenging*, 34 (Oct. 2010) (“GAO Report”).

⁴⁷ PAETEC Comments at 9.

⁴⁸ Comments of the Ad Hoc Telecommunications User Csers Committee (“Ad Hoc Comments”) at 5-6; Cbeyond *et al.* Comments at 7.

future.⁴⁹ For this reason, fixed wireless is not a viable alternative to the wireline broadband services that small and medium-size customers demand.

B. Self-Deployment of Last-Mile Facilities to Deliver Retail Broadband Services to the Small-to-Medium-Size Business Marketplace is Not Economically Viable

As a number of commenters explained, it is generally not feasible for competitors to deploy last-mile loop facilities to serve small and medium-size business customers,⁵⁰ which is consistent with the Commission's previous findings.⁵¹ The QSI Report released earlier this year demonstrates how the lack of access to § 251(c)(3) UNEs at cost-based prices impedes competition in the small-to-medium-size business broadband market.⁵² The QSI Report compared competitive broadband deployment costs with and without UNEs, analyzing the economic viability of leasing ILEC facilities with UNEs versus without, and the economic viability of deploying and self-provisioning last-mile facilities to small and medium-size business customers.

The QSI Report examined several deployment scenarios, including: (1) all-copper loops; (2) various combinations of hybrid fiber/copper loops (including traditional DLC systems and more advanced deployments such as AT&T's U-verse network), where CLECs must deploy their own remote terminals and obtain higher priced special access circuits and other ILEC facilities to connect their central office equipment to the remote terminal; (3) all fiber loops; and (4) self deployment.⁵³

⁴⁹ See, e.g., *Qwest Phoenix Forbearance Order*, ¶ 90.

⁵⁰ Cbeyond *et al.* Comments at 19-22, 28.

⁵¹ See *Triennial Review Remand Order*, ¶ 166.

⁵² QSI Report, at 12.

⁵³ *Id.* at 2-3.

The distinction between these first three loop configurations is significant given that CLECs have lost the ability to lease fiber loops and feeder subloops at cost-based UNE rates. The QSI Report reviews these deployment scenarios in a sample of ten (10) Metropolitan Statistical Areas (“MSAs”): Chicago, Dallas, Los Angeles, Miami, New York, Philadelphia, Phoenix, San Francisco, Seattle, and Washington, DC. The QSI Report found CLEC competition hampered by escalating costs due to higher or non-UNE based prices for configurations over fiber facilities.⁵⁴ As detailed in the QSI Report, CLEC costs of leasing all fiber or hybrid loops (\$620.60 to \$702.29 per month) as a means of providing 5 Mbps broadband services are magnitudes higher than the costs of leasing copper loops (\$68.61 to \$111.69 per month) to deliver the same speeds.⁵⁵ The QSI Report further concludes that CLECs face a price squeeze when they need to serve business customers in locations where copper loops are not available.⁵⁶ Specifically, the QSI Report found that ILEC fiber input costs across the ten MSAs are so high relative to the prevailing retail price that CLECs are unable to recover their lease costs.⁵⁷

The QSI Report also examined the economic viability of CLECs self-provisioning loop and transport fiber-optic facilities for the provision of broadband, concluding that CLEC construction and operation of facilities was not economically viable unless a large number of customers (over 24) are located at extremely short distances (0.5 miles or less) from an existing metropolitan fiber ring.⁵⁸ Even in such rare circumstances, CLECs’ ability to construct their own facilities are limited by practical considerations, including the significant time necessary for a

⁵⁴ *Id.* at 3.

⁵⁵ QSI Report, at 17.

⁵⁶ *Id.* at 19.

⁵⁷ *Id.*

⁵⁸ *Id.* at 6.

CLEC to plan, design, construct, and turn up self-provided network facilities in response to new customer demand.⁵⁹ Due to their large market share, ILECs are typically able to deploy broadband networks on a market-by-market basis, in advance of actual customer demand. CLECs, however, “are almost never able to adopt such a ‘if we build it, they will come’ strategy, and instead must attempt to get facilities in place as customer demand actually materializes.”⁶⁰

Accordingly, the QSI Report concludes:

- where UNEs are not available, a competitor cannot economically offer broadband retail products using an ILEC’s facilities;⁶¹ and
- it is “cost-prohibitive and economically non-viable” for a CLEC to self provision last mile facilities and justify competitive entry in order to offer broadband services to a small or medium sized business customer.⁶²

III. TO PROMOTE ROBUST RETAIL COMPETITION IN THE SMALL-TO-MEDIUM-SIZE BUSINESS BROADBAND MARKETPLACE, THE COMMISSION SHOULD REQUIRE THAT ILECS MAKE THEIR BROADBAND-CAPABLE FIBER LOOP FACILITIES AVAILABLE ON A WHOLESALE BASIS AT JUST AND REASONABLE RATES, TERMS AND CONDITIONS

A. Lessons Learned from Other High-Performing Countries Demonstrate that Making Fiber Loop Facilities Available on an Unbundled Basis Would Promote Broadband Penetration, Capacity and Affordability

1. Berkman Report

Unbundling and expanding competitive access to network elements, especially the local loop, is the roadmap to future growth. As part of the Commission’s inquiry into the “value of open networks,” Harvard University’s Berkman Center for Internet and Society conducted an independent review of broadband deployment and usage data from around the world.⁶³ The

⁵⁹ QSI Report, at 21-23.

⁶⁰ *Id.* at 22.

⁶¹ *Id.* at 3-4.

⁶² *Id.* at 36.

⁶³ See News Release, *Harvard’s Berkman Center to Conduct Independent Review of Broadband Studies to Assist FCC* (July 14, 2009).

significance of the Berkman Report cannot be overstated. The Berkman Report corroborates the QSI Report's conclusions that open access policies, including making Fiber Loop Facilities available on an unbundled basis, would stimulate competition and enhance the availability and affordability of broadband in the United States.⁶⁴

The Berkman Report found that “open access policies” including unbundling, bitstream access and collocation, among others, “are almost universally understood as having played a core role in the first generation transition to broadband in most of the high-performing countries.”⁶⁵ In addition, the Berkman Report found that open access policies “now play a core role in planning for the next generation transition,”⁶⁶ that is, the transition to advanced broadband with the capability of delivering download speeds of 100 Mbps. Even some countries that initially re-

⁶⁴ Berkman Center for Internet and Society, Harvard University, *Next Generation Connectivity: a Review of Broadband Internet Transitions and Policy From Around the World*, at 15 (2010) (“Berkman Report”), available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf. The BOCs, for obvious reasons, have eschewed the findings of the Berkman Report. *See, e.g.*, Opposition of AT&T Inc. to Cbeyond's Petition for Expedited Rulemaking, WC Docket No. 09-223, at 23 (filed Jan. 22, 2010) (“AT&T 1/22/10 Opposition in WC Docket No. 09-223”); Comments of Verizon, WC Docket No. 09-223, at 21 (filed Jan. 22, 2010) (“Verizon 1/22/10 Comments in WC Docket No. 09-223”). As the Berkman Report recognizes, the “incumbents almost always resist” open access regulations. *Id.* As expected, the incumbents in this case are resisting open access by claiming the objective Berkman Report is critically flawed. *See, e.g.*, AT&T 1/22/10 Opposition in WC Docket No. 09-223, at 23-24. The initial draft of the Berkman Report was released in October 2009, and comments were filed concerning its findings. The Report was subsequently revised to address the comments. In the final version released on February 16, 2010, the Report clearly notes that “[o]ur most prominent initial findings, confirmed and extended in this final draft, were that United States broadband performance in the past decade has declined relative to other countries and is no better than middling.” Berkman Report, at 8. The final draft of the Report also included, among other things, “new, extensive, formal literature review of the quantitative and qualitative literature on open access, in particular unbundling, and broadband performance and investment....” *Id.* Clearly, the objective findings of the Berkman Report itself provide sufficient bases and perhaps a legal obligation, per the case law discussed below, for the Commission to re-examine fully its unbundling policies and its past deregulatory approach.

⁶⁵ Berkman Report, at 13.

⁶⁶ *Id.*

jected open access requirements have incorporated unbundling into their policymaking to facilitate the transition from first generation broadband to more advanced broadband networks.⁶⁷

Equally significant to the Report's findings on open access policies is the significance of the vigor with which regulators enforce the open access policies. As the Report explains, "where an engaged regulator enforced open access obligations, competitors that entered using open access facilities provided an important catalyst for the development of robust competition."⁶⁸ Thus, the Report's principal finding on open access is that such policies, "where undertaken with serious regulatory engagement, contributed to broadband penetration, capacity, and affordability in the first generation of broadband."⁶⁹

Many regulators around the world have recognized that unbundling benefits and supports overall public welfare, as discussed above.⁷⁰ The international experience further suggests that unbundling played an important role even where facilities-based alternatives were available by serving "an important catalytic role in the competitive market."⁷¹ In some cases "competition introduced through open access drove investment and improvement in speeds, technological progression, reduced prices, or service innovations."⁷² It is thus understandable that the Berkman Report found that the "highest prices for lowest speeds" of broadband service "are overwhelmingly offered by firms in the United States and Canada, all of which inhabit markets structured

⁶⁷ *Id.* at 14 (discussing Switzerland and New Zealand shifts to open access policies in 2006).

⁶⁸ *Id.* at 15.

⁶⁹ *Id.* at 82.

⁷⁰ *Id.* at 84, 123 (describing the positive effects on the public welfare from increased broadband competition).

⁷¹ *Id.* at 84.

⁷² *Id.*

around ‘inter-modal’ competition.”⁷³ In contrast, “the lowest prices and the highest speeds are also all offered by firms in markets where, in addition to an incumbent telephone company and a cable company, there are also competitors who entered the market, and built their presence, through the use of open access facilities.”⁷⁴

To this day, ILECs “retain effective monopoly control of many ‘last mile’ facilities, and use these assets to compete in the same downstream markets as the ILECs’ wholesale customers.”⁷⁵ By pricing their wholesale rates to uneconomic levels, or by denying competitors access to next-generation facilities, the BOCs can eliminate, or at the very least, significantly limit competition in the retail market. Competition derived from open access is the catalyst to putting the United States back at the top of world broadband rankings, and the best way to spur such competition is to provide competitors unbundled access to Fiber Loop Facilities.

2. GAO Report

The recent GAO Report provides further examples of the numerous international policies that rely heavily on wholesale broadband access as a means to promote a competitive market and benefit consumers. The GAO Report found that that six out of the seven top broadband performing countries have unbundling policies to ensure a competitive national broadband services market. Further, the GAO Report found that all seven countries also regulate the price incumbent carriers can charge competitors for network access in order to “further encourage competition and ensure that incumbents do not stifle competition by charging prohibitively high prices for

⁷³ *Id.* at 15.

⁷⁴ *Id.*

⁷⁵ See Letter from Harold J. Feld, Legal Director, Public Knowledge, *et al.* to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 05-25, 06-172, 07-97, 09-135, 09-222, 09-223 (filed Feb. 12, 2010) (attaching Economics and Technology, Inc., *Regulation, Investment and Jobs, How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs*, at 2 (Feb. 2010) (“ETI Study”)).

access to their infrastructure.”⁷⁶ The GAO Report also notes that “[b]oth the Netherlands and Japan have required fiber unbundling, and Great Britain has proposed virtual unbundling of fiber.”⁷⁷ Finally, the Report concludes that unbundling laws, regulations, or both, that require incumbent telephone carriers to provide competitors access to their copper networks at wholesale prices result in “several consumer benefits, such as greater competition, higher speeds, more services, and lower prices.”⁷⁸

3. Recent CRTC Decision

As PAETEC previously discussed,⁷⁹ the Canadian Radio-television and Telecommunications Commission (“CRTC”) recently recognized the need for further open access policies, and expanded the obligations of ILECs and cable carriers to offer wholesale broadband transmission services to competitors. In this case, the ILECs’ wholesale obligations include access to FTTN.⁸⁰ As the CRCT found “an ILEC and cable carrier duopoly would likely occur in the retail residential Internet service market, and competition might be reduced substantially in small-to-medium-sized retail business Internet service markets” and that “retail Internet service competition would not continue to be sufficient to protect consumers’ interests.”⁸¹

⁷⁶ *Id.* at 27.

⁷⁷ *Id.*

⁷⁸ GAO Report, at 26 (“Unbundling has been credited with giving most urban residents in France, the United Kingdom, Sweden, the Netherlands, and Japan a choice of three or more providers.”).

⁷⁹ See PAETEC Comments at 14-15.

⁸⁰ CRTC Decision, ¶ 121.

⁸¹ *Id.* ¶ 55.

B. The Commission’s Rationale for Relieving ILECs of Their Obligation to Offer Fiber Loop Facilities has Been Proven Invalid

1. Deregulation has resulted in less overall investment

While the BOCs have elsewhere argued that re-imposing unbundling obligations will stifle investment,⁸² a number of studies, including the recent Economics and Technology, Inc. (“ETI”) Study, have shown that the FCC’s deregulatory policies over the past decade have not, as predicted, led to increased investment by ILECs, especially in terms of serving business customers.⁸³ On the contrary, “[f]acing only limited remnants of the post 1996 Act competition, the ILECs’ incentives to expand their own capital expenditures was diminished, and their investment outlays declined as well. Thus, while the combined net book value of telecom plant for AT&T, Qwest, and Verizon rose from \$142-billion in 1996 to \$155-billion in 2001, by 2007 it had dropped to only \$101-billion.”⁸⁴ Further, after “network neutrality” principles were applied

⁸² See, e.g., AT&T 1/22/10 Opposition in WC Docket No. 09-223, at 4-8; Comments of Qwest Communications International, Inc., WC Docket No. 09-223, at 22-25 (filed Jan. 22, 2010) (“Qwest 1/22/10 Comments in WC Docket No. 09-223”); Verizon 1/22/10 Comments in WC Docket No. 09-223 at 17-24 (claiming that BOCs will be unwilling to invest in networks if competitive carriers are granted access to fiber loop facilities as UNEs).

⁸³ ETI Study, at 6 (explaining that “firms will invest where, from their perspective, such investments will yield a positive return. An entrant will choose to build facilities rather than purchase wholesale services from the incumbent where (a) this approach is less expensive than buying wholesale services from the incumbent, *and* (b) the investment can be expected to produce a positive return. By overpricing wholesale services, the incumbent can discourage entrants’ use of wholesale services, but if the entrant’s cost of acquiring its own facilities is so high that the venture cannot be profitable, the investment will not be made. The incumbents thus focus their policy argument entirely upon (a) and entirely ignore (b).”) (emphasis in original).

⁸⁴ ETI Study, at ii. “The RBOCs today are only investing about half as much in their networks as they were at the start of this decade. Looking back over the period from 1996 through the end of 2007 (the most recent year for which financial data is available), RBOC capital investments peaked in the 2000-2001 time frame at approximately \$30-billion per year, and dropped off significantly after that. Total capital investments made during 2006 and 2007 was almost half of that amount – approximately \$17.5-billion per year.” ETI Study, at 7. While the BOCs criticized the ETI Study because it failed to correct for “.com bubble” investments and aftermath (see, e.g., AT&T 1/22/10 Opposition in WC Docket No. 09-223 at 13; Qwest 1/22/10 Comments in WC Docket No. 09-223 at 18; Verizon 1/22/10 Comments in WC Docket No. 09-

to AT&T subsequent to the merger with SBC, investment in facilities marginally increased, albeit not to pre-deregulatory levels. The BOCs have long argued that application of “network neutrality” rules will stifle investment. However,

[i]n 2006 – prior to agreeing to the five network neutrality principles⁸⁵ – AT&T and all its then-current and future subsidiaries (*i.e.*, the full post-2006 company, which includes SBC, BellSouth, Cingular – or AT&T Mobility – and ATTC) made \$18.2 billion in gross capital expenditure investments. After two years of operating under a strict network neutrality regime, the company’s gross capital expenditures rose to \$20.34 billion. In

223 at 20-21), the ETI Study addresses these “.com” bubble arguments. *See* ETI Study, at 3 n.8 (noting that “[t]hese critics’ timing argument is primarily a quibble about the exact dates of particular FCC orders, but it does not rebut the fundamental conclusion that, by 2001, the handwriting was on the wall: The FCC was committed to retreating from regulation of RBOC wholesale access services.”), and 12-13 (“[e]ven if macro-level trends in the economy might have resulted in overall reductions to capital investment levels (for example, after the “tech bubble” burst in 2000-2001) the elimination of regulation of wholesale services exacerbated the general economic trend and while investment throughout the rest of the economy rebounded after a year or two investment by ILECs and CLECs did not.”).

⁸⁵ The five network neutrality principles to which AT&T agreed were intended to promote open networks, albeit from the consumer perspective. The first four principles were from the Commission’s *Internet Policy Statement*: To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement, consumers are entitled to connect their choice of legal devices that do not harm the network, and consumers are entitled to competition among network providers, application and service providers, and content providers. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*; CC Docket Nos. 02-33, 01-337, 95-20 & 98-10, GN Docket No. 00-185, CS Docket No. 02-52, *Policy Statement*, 20 FCC Rcd 14986 (2005) (“*Internet Policy Statement*”). AT&T/BellSouth also agreed “not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth’s wireline broadband Internet access service based on its source, ownership or destination.” *See* Letter from Robert W. Quinn, Senior Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Dec. 28, 2006).

terms of capital expenditures as a percentage of revenues, AT&T's investment increased from 14.9 percent in 2006 to 16.4 percent in 2008⁸⁶

Thus, while BOC plant investment overall has decreased since deregulatory policies were first put into place, more recent open access regulation has not necessarily resulted in a further net decrease in investment. On the contrary, after open access rules were applied to AT&T, investments in the telecommunications plant increased both in pure dollars and in terms of percentage of the company's revenues, demonstrating that more regulation does not result in less investment.⁸⁷

While investment in the plant that serves residential mass-market consumers is certainly important, investment in business-class broadband has the added benefit of stimulating small and medium-size business growth. From the perspective of business customers, however, the ETI Study shows that "the magnitude of recent RBOC broadband investments is even less impressive than the aggregate investment data would suggest. Recent RBOC broadband investments have targeted residential rather than enterprise or small business customers and services. Even residential investment initiatives have been more targeted than ubiquitous."⁸⁸ Further, the ETI Study shows that:

⁸⁶ Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, at 24 (filed Jan. 14, 2010) (citing "[C]ompany annual reports, which includes data for 2005 from SBC, ATTC, Bell South and Cingular Wireless. For 2006, data are included from SBC, Bell South and Cingular Wireless. This ensures accurate comparability across all years.").

⁸⁷ AT&T's earlier claims, for example, that the Commission's expectations regarding the deregulation of Fiber Loop Facilities have been met are without merit. *See* AT&T 1/22/10 Opposition in WC Docket No. 09-223 at 8. Certainly more people use the Internet today than did in 2001, but the relative amount of capital investment as compared to company revenues have steadily decreased over that time period, which has led to higher prices, slower services, network congestion, and millions of Americans left unserved altogether.

⁸⁸ ETI Study, at 8-9.

- Verizon spent 42% more on telecommunications plant during the six-year period during which regulation of wholesale rates was in effect than during the subsequent six-year period of deregulation;
- AT&T Inc. spent about one-third less during the post-regulation time frame than when wholesale services prices and access were still being regulated;
- Qwest spent almost three times as much on telecommunications plant during the six-year period when wholesale regulation was in effect than the subsequent six years when most of its wholesale services and rates had been deregulated.⁸⁹
- Most of the CLECs that have not gone out of business since 2001 have either been acquired by others or have significantly curtailed their capital spending and business ambitions.⁹⁰

ETI projects, however, that if the Commission were to re-impose effective regulation on essential wholesale network facilities, cumulative investment by ILECs and CLECs will be significantly stimulated and “will increase between \$20-billion (under the most conservative assumptions) and \$60-billion (under what [it] believe[s] to be the most realistic scenario) by 2014, compared to the level of investment that can be expected to occur absent significant regulatory reform.”⁹¹

2. Deregulation has led to sector job losses

Telecom-sector employment since 2001 has also suffered, largely from the lack of competition-friendly regulatory policies that promote entry into the market. “With ‘competition unfriendly’ regulatory policies in place, the telecommunications sector has experienced steady and persistent job losses – a drop of more than 400,000 jobs, including the loss of 140,000 jobs at the [RBOCs], between 2001 and 2007. The only growing segment of the telecommunications industry was wireless where, during the relevant period, there had been four or more competitors

⁸⁹ See *id.* at 9-10.

⁹⁰ See *id.* at 12.

⁹¹ *Id.* at iv, 32; see also QSI Report, at 19, 36.

in virtually every geographic market.”⁹² As the ETI Study reveals, once the Commission dismantled wholesale regulation, neither ILEC nor CLEC investment levels experienced the predicted growth – growth that could have fueled jobs and economic growth. “Choking off potential competition not only works to foreclose investment opportunities for new entrants, it also operates to eliminate the urgency of competitive responses on the part of the incumbents, enabling them to defer investments as well.”⁹³

ETI explains that “restoring pro-competitive regulation for wholesale broadband services should lead to a large-scale growth in employment for ILECs and CLECs, reversing the persistent job losses that occurred between 2001 and the present.”⁹⁴ ETI forecasts

year-over-year job additions and cumulative job growth over a five-year period using three assumption sets. Even applying our most conservative assumptions, we forecast that there will be 135,000 more telecom sector jobs by 2014 if the FCC restores effective regulation to broadband wholesale services than if it accedes to a continuation of the current deregulatory regime. Under what we believe to be a more realistic assumption set, additional jobs in that sector over the same period could exceed 450,000.⁹⁵

In sum, the Commission’s prediction that deregulation would lead to increased investment in fiber loops has not been realized, largely because the lack of competition in the area has led BOCs to reduce investing in facilities, which, in turn, has resulted in technological stagnation (compared to what a fully competitive market would provide) in the broadband market on a nationwide basis, as well as job losses and an aging and over-stressed infrastructure. “We believe it is fair to view these job losses as one of the ‘costs’ to the US economy of deregulation. Despite the proliferation of demand and explosion of consumer and business spending on telecommuni-

⁹² ETI Study, at ii.

⁹³ *Id.* at 4-5.

⁹⁴ *Id.* at iv.

⁹⁵ *Id.*

cations services over the last decade, the industry as a whole today employs 40% fewer workers than it did at year-end 2000.”⁹⁶

C. The Berkman Report Debunks the Commission’s Policy Rationale for Relieving ILECs from Offering Fiber Loop Facilities on an Unbundled Basis

1. Investment theory debunked

The Berkman Report also presents powerful data refuting the Commission’s primary rationale for limiting unbundling that assumed that incumbents would not invest in Fiber Loop Facilities if they had to share them with competitors⁹⁷ – a premise likewise debunked by the ETI Report, as discussed above. As the Berkman Report illustrates, this assumption, foisted on the Commission by the BOCs’ self-serving promises,⁹⁸ is inconsistent with the data from other countries that promoted competition through unbundling.

In Japan, for example, NTT is required to provide unbundled access to fiber loops.⁹⁹ Nevertheless, NTT continues to invest in deploying more fiber and other companies are deploying their own fiber facilities.¹⁰⁰ As a result of this competition, even in the face of unbundling requirements that encompass copper and fiber loops, FTTH deployment in Japan has grown rapidly, from approximately 2 million subscribers in 2004, to over 15 million subscribers as of

⁹⁶ ETI Study, at 15.

⁹⁷ See, e.g., *Triennial Review Order*, ¶¶ 213, 272, 288.

⁹⁸ See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21515 (statement of Chairman Powell) (2004).

⁹⁹ Fujino, *National Broadband Policies: 1999-2009 Japan*, Embassy of Japan, at 19 (October 2009), at http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/presentation/pdf/091019_1.pdf.

¹⁰⁰ Berkman Report, at 288. (“The government sees no evidence that these policies have diminished NTT’s incentives to invest in infrastructure.”) (*citing* Comments to the FCC by the Government of Japan, FCC Docket 09-51).

last year.¹⁰¹ Likewise, in France, the incumbent France Telecom has responded to the competition from providers using unbundled loops with increased investment in its own fiber.¹⁰²

Even those countries that initially abstained from unbundling have moved towards unbundling.¹⁰³ New Zealand, for example, lagged other OECD countries until it adopted an unbundling policy in late 2006. Since revisiting its position, New Zealand has climbed the rankings and experienced new investment by unbundling-based competitors.¹⁰⁴ The same holds true with the U.K., and even British Telecom, the primary U.K. incumbent, agrees that “fair [open access] regulation does not deter network investment.”¹⁰⁵

Similarly, the experience in Canada, which merely paid lip service to an unbundling requirement, is telling as its rankings declined steadily while other countries sparked growth and innovation in broadband through more progressive unbundling and open access policies. Although Canada has an unbundling requirement, there is little if any competition from unbundling-based competitors. This is explained in no small part by the fact that Canada has the *highest prices* for unbundled loops of any of the OECD nations.¹⁰⁶ In Canada, the average rate (excluding extremes such as in dense urban centers or remote rural areas) for unbundled access was 70 percent higher than in South Korea and Denmark, 50 percent higher than in Italy, 30

¹⁰¹ Fujino, National Broadband Policies: 1999-2009 Japan, at 6.

¹⁰² Berkman Report, at 154 (“France Telecom has responded to all this activity with higher investment and lower prices.”).

¹⁰³ *Id.* at 13.

¹⁰⁴ Berkman Report, at 87-88.

¹⁰⁵ Letter from Sheba Chacko, British Telecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, GN Docket No. 09-51, attachment at 30 (filed Dec. 15, 2009).

¹⁰⁶ Berkman Report, at 168.

percent higher than in Japan, France and Norway, and 25 percent higher than in Finland or the U.K.¹⁰⁷

The impact on Canada's broadband standings is predictable. Between 2003 and 2008, Canada fell from second to tenth on the list of OECD countries with broadband penetration per 100.¹⁰⁸ Canada ranks below the United States on both speed and price, ranking 19th for speed.¹⁰⁹ The Canadian example is consistent with the United States experience, where investment and entry has been shown to be *not just dependent on the availability of loops, but the availability of loops at an economically efficient price that allowed economic entry by competitors.*

However, Canada has taken steps to abruptly turn its rapidly dropping standings around with its recent August 30, 2010 order that furthered its open access policy. Significantly, in this order, the CRTC rejected the ILECs' argument that "if wholesale access were mandated for their next generation infrastructure, investments would be reduced in light of the financial risks they were taking."¹¹⁰ The CRTC explained, "there is no utility in determining what, if any, facilities could be identified as "next generation" and "determined competitors continue to require access to the wholesale services currently offered by the incumbents to ensure that sufficient competition exists in the provision of retail Internet services." In this case, as previously noted, the ILECs' wholesale obligations include access to FTTN.¹¹¹ As ETI recently succinctly explained, this "regulatory model imposes regulation in those upstream [*i.e.*, wholesale] segments where market

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at ¶ 117.

¹¹¹ *Id.* at ¶ 121.

failure could arise precisely so as to reduce the potential for such market failure in downstream [*i.e.*, retail] segments that rely upon upstream [*i.e.*, wholesale] inputs.”¹¹²

2. Intermodal competition theory debunked

The Berkman Report also presents powerful data refuting the Commission’s policy preference for intermodal competition¹¹³ (*i.e.*, last-mile facilities overbuilding) over intramodal competition through unbundling. According to the Berkman Report, firms in the United States and Canada that rely primarily on intermodal competition offer the highest prices and lowest speeds, while firms in countries that have robust unbundling *offer the highest speeds and lowest prices*.¹¹⁴ The Berkman Report found that “facilities-based competition usually complements, rather than substitutes for,” open access and unbundling-based competition.¹¹⁵

This principle is aptly illustrated by the Japanese experience. As the Berkman Report explains, unbundling enabled Yahoo!BB to enter the Japanese DSL market using loops obtained from the incumbent, NTT.¹¹⁶ Thereafter, NTT, which had largely invested in ISDN as its technology of choice, responded to unbundling competition by abandoning its plans for ISDN and

¹¹² *Id.*

¹¹³ As part of its rollback of unbundling in the 2003 *Triennial Review Order*, the Commission expressed a preference for intermodal competition as opposed to competition through unbundling. *See, e.g., Triennial Review Order*, ¶¶ 97, 234, 245. In justifying its reliance on intermodal competition, the Commission has made assumptions that turned out to be mostly false hopes. While the Commission’s “intermodal competition” mantra was mainly about telco against cable competition, the Commission touted the benefits of other technologies that always seemed to be right around the corner, from LMDS, to BPL, to fixed wireless, to municipal Wi-Fi, to Wi-Max. None of these has ever demonstrated the ability to make sufficient inroads in the broadband market. Additionally, a spate of mergers in the mobile wireless sector has dampened the threat of mobile competition as the two dominant wireless companies are also the two dominant incumbent telephone companies.

¹¹⁴ Berkman Report, at 171.

¹¹⁵ *Id.* at 84.

¹¹⁶ *Id.* at 133, 139.

shifting to DSL and fiber investment.¹¹⁷ While YahooBB! now has slightly over one third of the Japanese DSL market, its owner Softbank is also investing in fiber and fixed mobile.¹¹⁸ Other companies that have invested in fiber are also using unbundled loops to provide DSL where they can not deploy fiber.¹¹⁹ In Japan, “unbundling operated exactly as anticipated – it created low barriers for an entrant who was able to innovate, create a brand, and become an aggressive competitor.”¹²⁰ Similar results were also found in Denmark, Sweden and Norway.¹²¹

In France, as another example, one of the principal competitors to the incumbent France Telecom first grew its business and brand through the use of unbundled loops and has since expanded into deploying its own fiber and providing subscribers with a bundle of 100 Mbps upload/50 Mbps download broadband, HDTV, unlimited voice, and access to Wi-Fi when away from their homes for approximately \$33/month.¹²² Other competitors to France Telecom provide subscribers similar bundles over a mix of both self-deployed and unbundled loops.¹²³

In fact, the experience of a number of countries as catalogued in the Berkman Report challenges the underlying premise of the Commission’s intermodal competition policy that expects competition to develop between companies that use different platforms. The Report found that more robust competition, and thus greater consumer benefits, tend to result where companies “each compete across multiple platforms.”¹²⁴

¹¹⁷ *Id.* at 139.

¹¹⁸ *Id.*

¹¹⁹ Berkman Report, at 85.

¹²⁰ *Id.*

¹²¹ *Id.* at 145.

¹²² *Id.* at 153.

¹²³ *Id.*

¹²⁴ *Id.* at 145.

3. The Berkman Report Demonstrates that the Commission Should re-examine its unbundling policy and require ILECs to unbundle Fiber Loop Facilities

The Berkman Report provides ample evidence that limitations on unbundling have hindered the development of the broadband market in the United States. Given these findings, now is an opportune time for the Commission to reexamine whether relieving ILECs of unbundling Fiber Loop Facilities has benefited the public interest. The fact that United States consumers are paying higher prices for lower quality service than in other countries strongly suggests not.

Moreover, while the Commission also relieved ILECs of broadband unbundling in the belief that it would create incentives for both ILECs and new entrants to invest in new facilities and deploy new technology, the Berkman Report, the QSI Report and the ETI Report all demonstrate the fallacy in that policy. At a time when the United States was falling behind other industrialized market economies, United States consumers were denied the benefit of competitive broadband services because it is cost prohibitive to duplicate the embedded network that incumbents possess. Consequently, the United States has essentially and unfortunately condoned a broadband marketplace served, at best, by a cable-ILEC duopoly for broadband services, and a monopoly environment when businesses want to use high capacity broadband connections offering meaningful service quality assurances. This result, by its nature, has left this country far behind similar economies when it comes to bringing innovative, robust and affordable broadband services to all of its citizens.

For the foregoing reasons, the Commission needs to reexamine its unbundling policy and require ILECs to unbundle Fiber Loop Facilities. As discussed herein, the public interest benefits of doing so would be enormous. Apart from promoting broadband availability, innovation and competitive prices for such services, adopting such an unbundling policy has a high potential for

reducing unemployment and creating much needed jobs.¹²⁵ Evidence provided herein demonstrates that this unbundling approach is not only justified under Section 251(c)(3) of the Act but also facilitates an outcome that both Section 706 of the Act¹²⁶ and the 2009 Recovery Act¹²⁷ demand.

IV. THE COMMISSION HAS THE RESPONSIBILITY AND AUTHORITY TO REVERSE COURSE IMMEDIATELY AND MANDATE UNBUNDLED ACCESS TO ILECS' LAST-MILE FIBER LOOP FACILITIES

A. The Commission is Charged with Ensuring U.S. Small and Medium-Size Businesses Have Access to Advanced Services, at Reasonable Prices

There is no reason for the Commission to hesitate in requiring ILECs to unbundle Fiber Loop Facilities. The Commission is charged with ensuring that our country, its citizens, and its businesses have access to the most advanced communications services available. Congress has directed the Commission to reexamine broadband policy and create a holistic plan to bring next-generation broadband to all Americans. Section 706 of the 1996 Act also directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by using measures to “promote competition in the local telecommu-

¹²⁵ See, e.g., Petition for Expedited Rulemaking Filed By Cbeyond Inc., WC Docket No. 09-223, at 20-22 (filed Nov. 16, 2009).

¹²⁶ See 47 U.S.C. § 157 nt (directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, in a manner consistent with the public interest, convenience, and necessity...measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”).

¹²⁷ American Recovery and Reinvestment Act of 2009, Pub L. 111-5, 123 Stat. 115 (“Recovery Act”), § 6001(k)(2) (tasking the Commission with the responsibility for developing a national broadband plan “to ensure that all people of the United States have access to broadband capability”). See also Broadband Data Improvement Act, 47 U.S.C. §1302 (directing the Commission to encourage deployment of advanced telecommunications capability to all Americans by utilizing, among other things, “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investments”)

nications market” and “remove barriers to infrastructure investment.”¹²⁸ As discussed above, competition in all areas of the telecommunications market is necessary to ensure that consumers have the most choices and best services available at the lowest price. Given the goals and policies that Congress has recently given the Commission, it is incumbent on the Commission to revisit the deregulatory decisions of the past. As discussed above, United States broadband policy is not on par with high-performing industrialized countries, economic incentives are skewed, and investments across the broadband sector are insufficient to make up this gap. Unfortunately, the United States has, at bottom, created a broadband marketplace that has left the country, and especially the small-to-medium-size business community, behind.

B. The Commission has the Authority to Review its Prior Decisions

The Commission has the authority to act and reverse course immediately. The FCC’s “decision in [a] particular matter... is not chiseled in marble” and can be reassessed as it reasonably sees fit “based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area,” as long as it provides a reasoned basis for doing so.¹²⁹ The predictive judgment that removing competitor access to Fiber Loop Facilities would lead to more investment has proven false – the BOCs’ own data show that investment has decreased, broadband services remain limited in technology and deployment, and prices are high. The Commission must vigilantly monitor the consequences of its deregulatory decisions, and in light of actual market developments, reconsider its prior decisions.

Moreover, in revisiting a prior policy, the Commission has the right to adopt a new policy and need not demonstrate “to a court’s satisfaction” that a new policy is “better” than the old

¹²⁸ 47 U.S.C. § 157 nt.

¹²⁹ *Ad Hoc Telecommunications Users Committee, et al. v. FCC*, Case No. 07-1426 (D.C. Cir. Jul. 17, 2009).

one; rather, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.”¹³⁰ As explained above, requiring unbundling of Fiber Loop Facilities, under both Sections 251 and 271, would be the better policy choice, especially in light of Congress’ goal of deploying advanced, and affordable, broadband services to all Americans. As such, the Commission has the authority to revisit its past decisions to make such changes in course as are necessary to carry out the goals of the 1996 Act.

Given the Commission’s broad authority to re-orient unbundling policy to correct the failures of the last decade’s broadband policy, it should not hesitate to do so. As the expert agency charged with implementing the pro-competition provisions of the 1996 Act, as well as the creator of the National Broadband Plan, the Commission should take all necessary steps to ensure that broadband competition flourishes, “to ensure that all people of the United States have access to broadband capability.”¹³¹ The Commission should revisit its decision not to require ILECs to offer unbundled access to Fiber Loop Facilities serving small and medium-size customers in accordance with Section 251(c)(3), and should concurrently review its forbearance decision that relieved BOCs from offering these facilities pursuant to Section 271. As the latter decision was largely based on the policy rationale of the former decision, the Commission should review these decisions in tandem.

V. CONCLUSION

The Commission should take affirmative steps to address the trends and issues discussed herein and in PAETEC’s earlier comments in furtherance of the Commission’s goal that “busi-

¹³⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. ____ (2009).

¹³¹ 47 U.S.C. § 1305(k)(2).

nesses realize the maximum benefits of broadband services and competition.”¹³²

Respectfully submitted,

/s/William A Haas

William A. Haas
Vice President of Public Policy and Regulatory
PAETEC
1 Martha’s Way
Hiawatha, IA 52233
Tel: (319) 790-7295
Fax: (319) 790-7901
Email: william.haas@paetec.com

Andrew D. Lipman
Russell M. Blau
Philip J. Macres
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
Tel: 202-373-6000
Fax: 202-373-6001
Email: andrew.lipman@bingham.com
Email: russell.blau@bingham.com
Email: philip.macres@bingham.com

Counsel for PAETEC Holding Corp.

Date: November 4, 2010

¹³² *Public Notice*, at 2.