

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

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

**REPLY COMMENTS OF
THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

On November 16, 2009, Cbeyond, Inc. (“Cbeyond”) filed a petition with the Federal Communications Commission (“FCC” or “Commission”) for expedited rulemaking, seeking adoption of rules requiring incumbent local exchange carriers (“LECs”) “to provide unbundled access, pursuant to Section 251(c)(3) of the Act, to the packetized bandwidth of hybrid fiber-copper loops, fiber-to-the-home (‘FTTH’) loops, and fiber-to-the-curb (‘FTTC’) loops, at the same rates that incumbent LECs charge their own retail customers, for the purpose of serving small business customers.”¹ Pursuant to the Commission’s Public Notice,² the National Association of State Utility Consumer Advocates (“NASUCA”)³ files these reply comments, to support the Cbeyond Petition,

¹ Cbeyond Petition at 1 (footnote omitted).

² DA 09-2591 (rel. December 14, 2009).

³ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

with two qualifications: the unbundled fiber should be priced at forward-looking economic costs – rather than retail rates – and the fiber should be available for serving all customers – not just small business customers.

Comments were filed opposing the Cbeyond Petition by incumbent LECs (“ILECs”)⁴ and by those beholden to the ILECs in their market-dominant deployment of fiber.⁵ Comments were also filed by competitive providers (referred to here for convenience as competitive local exchange carriers, or “CLECs,” despite the fact that the services they provide go well beyond local exchange service).⁶

Notably, comments were also filed by the Office of Advocacy, U.S. Small Business Administration (“SBA”), which represents the interests of the small businesses that would benefit from the intramodal competition that would occur due to the unbundling. Many NASUCA members also represent the interests of small businesses in utility matters, and we agree with SBA in our support of the Cbeyond Petition.⁷

The United States Supreme Court has recently specified the standard under which the FCC can justify a change in policy. NASUCA submits that those circumstances pertain here: The Commission found that CLECs would not be impaired without access to fiber, and that the required unbundling of fiber would act as a disincentive to

⁴ AT&T Inc. (“AT&T”); Independent Telephone & Telecommunications Alliance (“ITTA”); Qwest Communications International, Inc. (“Qwest”); Verizon.

⁵ Corning Incorporated (“Corning”); Telecommunications Industry Association and the FTTH Council North America (“TIA, et al”).

⁶ COMPTTEL; Covad Communications Company (“Covad”); Integra Telecom, Inc. and One Communications Corp. (“Integra, et al”); PAETEC Holding Corp. (“PAETEC”); XO Communications, LLC (“XO”).

⁷ Various NASUCA members also exclusively represent residential customers and some represent all utility customers. That breadth of representation is the basis for our position that access to unbundled fiber should not be limited to small businesses.

investment. History shows, however, that CLECs have in fact been, or have become, impaired in providing services without access to the fiber (and fiber-related) loops for which the Commission did not require unbundling.⁸ History has also shown that the construction of fiber loops as to which unbundling is not required has been the result of ILECs' market-dominant self-serving decisions,⁹ which have denied consumers competitive alternatives. As the Supreme Court stated:

[T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; 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, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.¹⁰

The FCC can easily justify this change under the Supreme Court's requirement. In particular, the Commission could find that the predicted circumstances that led it not to require unbundling of fiber loops have not proved out, and now a different unbundling

⁸ Cbeyond Petition at 14; XO Comments at 3; Covad Comments at 12-14. The ILECs' arguments to the contrary (see, e.g., Qwest Comments at 6) are unconvincing. Indeed, Qwest cites to the competition coming from Integra, PAETEC and XO (id. at 14), when these are the very carriers that assert in comments here that they are impaired without access to the ILECs' fiber loops.

⁹ Cbeyond Petition at 15-16; PAETEC Comments at 6-7, 8-10; Covad Comments at 5-6. Qwest admits that ILEC fiber broadband lines had only increased to 2.3 million by June 2008 (Qwest Comments at 16; see also id. at 20-21; AT&T Comments at 2), hardly a flood of investment. Generalizations about other types of broadband (see, e.g., AT&T Comments at 2) are misleading.

¹⁰ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (emphasis in original; citation omitted).

regime will provide a better means to administer the Act's obligations.¹¹

The "intermodal" competition provided by cable offerors is largely not available to small businesses.¹² And the cableco/ILEC duopoly is nowhere near effective competition.¹³ Verizon cites a study from the Fiber-to-the-Home Council that says that there are 681 facilities-based providers of fiber broadband service, which serve 1.1 million customers.¹⁴ This amounts to just over 1600 customers per provider, and, as Verizon admits, "includes CLECs that are divisions of ILECs."¹⁵

The growing national importance of broadband makes unbundling of fiber a new priority.¹⁶ This was not necessarily contemplated when the Commission initially decided not to require fiber unbundling. COMPTTEL points out the new emphases on broadband **for all customers** under the American Recovery and Reinvestment Act.¹⁷ This requires a reevaluation of the Commission's earlier impairment analyses.¹⁸ And it requires

¹¹ The Commission will likely note a great similarity between these reply comments and the reply comments that NASUCA recently filed on the Petition by a number of CLECs for rules pertaining to network elements under 47 U.S.C. § 271. See *In the Matter of 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) of the Act*, WC Docket No. 09-222, NASUCA Comments (February 10, 2010). Consumers' continuing interest in and need for intramodal competition require the similar positions.

¹² Cbeyond Petition at 17; PAETEC Comments at 4; COMPTTEL Comments at 4; Integra, et al Comments at 2-3.

¹³ See, e.g., Verizon's discussion of competition from cable (Verizon Comments at 12-13), which overlooks the fact that those cable providers do not compete against each other.

¹⁴ Id. at 11.

¹⁵ Id., n.36.

¹⁶ See Cbeyond Petition at 20-21; PAETEC Comments at 3; COMPEL Comments at 2-3, 5; Integra, et al Comments at 2; Covad Comments at 2. Which is not to say that copper loops can be abandoned, as they also provide opportunities for broadband competition. See PAETEC Comments at 5; COMPTTEL Comments at 2; XO Comments at 5-9; Covad Comments at 4. But there are broadband services that cannot be provided effectively over copper. Integra, et al Comments at 4-6.

¹⁷ COMPTTEL Comments at 7.

¹⁸ As described, for example, by AT&T and Verizon. AT&T Comments at 4-8; Verizon Comments at 4-9.

rejection of the ILECs' arguments that "broadband is broadband," regardless of the facilities over which it is provided.¹⁹

As noted above, NASUCA does not believe that the unbundling requirement should be at retail rates.²⁰ In the first place, this pricing does not even contemplate the wholesale discount created by the statute for resale services.²¹ More importantly, the use of forward-looking economic cost – like the total element long-run incremental cost standard used for unbundled network elements – is generally acknowledged to be the most appropriate for intercarrier pricing. That is, unless one of the carriers has market power and hopes to dictate its own "market-based" price.²² Thus NASUCA joins those commenters who support forward-looking costing for fiber.²³

Qwest refers to this unbundling as "potentially destructive regulation...."²⁴ Offering additional competitive opportunities for advanced services to small businesses and other customers will be constructive. It is unfortunate that such unbundling requirements can be imposed only upon ILECs,²⁵ rather than upon all facilities owners, but that is all the law allows. It is what the law allows, however.²⁶ NASUCA urges the Commission to grant Cbeyond's Petition.

¹⁹ See, e.g., AT&T Comments at 20-22; Verizon Comments at 9-10.

²⁰ Notably, Qwest asserts that even the retail rate would not be compensatory for the ILECs. Qwest Comments at 3. This raises interesting questions about the cost basis for those retail rates, which appear to be very high to start with.

²¹ 47 U.S.C. § 252(d)(3).

²² See Verizon Comments at 24-25.

²³ PAETEC Comments at 2; COMPTTEL Comments at 1, n.1; XO Comments at 9-11; Covad Comments at 17.

²⁴ E.g., Qwest Comments at 11.

²⁵ Verizon Comments at 15

²⁶ This dissolves Verizon's attempt to raise constitutional "takings" issues. *Id.* at 25-26.

Respectfully submitted,

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