

**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)** )

**COMMENTS OF COMPTTEL**

COMPTTEL, through undersigned counsel, hereby submits its comments on the above-captioned Petition of Cbeyond, Inc. for an expedited rulemaking to require incumbent LECs to provide unbundled access pursuant to Section 251(c)(3) of the Communications Act, 47 U.S.C. §251(c)(3), to the packetized bandwidth of hybrid, fiber to the home (FTTH) and fiber to the curb (FTTC) loops.

COMPTTEL supports Cbeyond's request that the Commission reexamine its premature decisions to deregulate non-TDM based broadband services and to reestablish the right of competitors to obtain access to the incumbent LECs' broadband facilities at wholesale prices.<sup>1</sup> COMPTTEL and its members have repeatedly urged the Commission, consistent with Congress' intent in enacting the Telecommunications Act of 1996, to preserve competitors' wholesale rights to the last mile access facilities that remain bottlenecks in the incumbents' networks,

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<sup>1</sup> Cbeyond Petition at 5-13. COMPTTEL does not necessarily endorse Cbeyond's proposal that packetized bandwidth be made available at retail rates, but instead suggests that the Commission seek comment on wholesale pricing alternatives in the rulemaking proceeding.

facilities that entrants cannot economically duplicate.<sup>2</sup> Competitors have successfully utilized copper loops to provide exceptional high capacity services, such as Ethernet, and have asked the Commission to take affirmative steps to restrict the ability of incumbents to remove or dismantle copper loops when they deploy fiber in order to ensure that competitors are not deprived of the last mile access necessary to reach their customers and that end users are not deprived of a choice in broadband service providers.<sup>3</sup> Those requests remain pending.

Unfortunately, because of distance limitations, copper loops may not be suitable for provisioning high capacity services to many business locations. Cbeyond's request that the Commission open a rulemaking on competitors' rights to wholesale access to the packetized bandwidth of the incumbents' last mile fiber loops represents another avenue that the Commission should pursue in its efforts to make broadband available at affordable rates to all Americans. The Commission has devoted tremendous resources over the past year to the development of a National Broadband Plan "to enable the build-out and utilization of high-speed broadband infrastructure" and has set as a goal providing access to "robust broadband services" to "every American citizen and every American business."<sup>4</sup> In its Notice of Inquiry requesting comments on the Broadband Plan, the Commission opined that high speed ubiquitous broadband can "help restore America's economic well being and open the doors of opportunity for more

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<sup>2</sup> See, e.g., COMPTTEL December 7, 2009 *Ex Parte* filed in GN Docket Nos. 09-47, 09-51, 09-137 and RM-11358; Petition for Rulemaking and Clarification filed January 18, 2007 by BridgeCom International, *et al.*, RM 11358; Petition for Rulemaking filed by XO Communications, *et al.* on January 18, 2007, RM -11458.

<sup>3</sup> See, COMPTTEL December 7, 2009 *Ex Parte*.

<sup>4</sup> *In the Matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) at ¶¶1, 3.

Americans.”<sup>5</sup> A driving force in the economic recovery will be the ability of small businesses to prosper and grow. As Chairman Julius Genachowski recently noted, small businesses have created over 93% of all net new jobs over the past 15 years. Nonetheless, many small businesses do not have “access to the high speed, high quality broadband connections that are critical to today’s fiercely competitive global market place.”<sup>6</sup> Chairman Genachowski’s observation is consistent with Cbeyond’s assertion that small businesses today often do not have access to many of the sophisticated “big business” communications products and applications that would allow them to operate more efficiently<sup>7</sup> and thereby continue to create, or at least not eliminate, jobs.

The Commission’s currently effective Strategic Plan sets forth six strategic goals, two of which are particularly relevant to Cbeyond’s request for rulemaking. Those two goals are:

All Americans should have affordable access to robust and reliable broadband products and services. Regulatory policies must promote technological neutrality, competition, investment and innovation to ensure that broadband service providers have sufficient incentive to develop and offer such products and services.

Competition in the provision of communications services, both domestically and overseas, supports the Nation’s economy. The competitive framework for communications services should foster innovation and offer consumers reliable, meaningful choice in affordable services.<sup>8</sup>

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<sup>5</sup> *Id.* at ¶1.

<sup>6</sup> Prepared Remarks of Chairman Julius Genachowski, Broadband Field Hearing on Small Business, Chicago, Illinois, December 21, 2009 (“But over 50 percent of small businesses are still without Web sites. Many small businesses do not have access to a basic broadband connection. One estimate indicates that 26 percent of rural business sites do not have access to standard cable modem and 9 percent don’t have DSL. And many more do not have access to the high-speed, high-quality broadband connections that are critical in today’s fiercely competitive marketplace.”)

<sup>7</sup> Cbeyond Petition at 3-4.

<sup>8</sup> Federal Communications Commission, Strategic Plan 2009-2014 (Sep. 30, 2008) at 3.

It has been a long time since the Commission has implemented regulatory policies that promote competition in the provision of broadband services and a competitive framework that offers end users reliable and meaningful choice in affordable services. Today the broadband market is dominated by cable operators and incumbent local exchange carriers.<sup>9</sup> With this duopoly in place, the United States' rankings in broadband speed, penetration and affordability are dismal when compared to those of other developed countries<sup>10</sup> and have dropped precipitously since 2001.<sup>11</sup>

Chairman Genachowski's acknowledgement that many small businesses lack access to affordable high speed, high quality broadband connections necessary to compete in a global economy should be a call to action for the Commission to actively promote competition in the broadband market. The duopolists apparently have chosen not to focus their resources on developing innovative broadband products for delivery to the small business market segment. At the same time, the Commission has limited competitors' rights to obtain wholesale access to unbundled broadband elements under both Section 251(c)(3) and Section 271 to TDM-based DS1s and DS3s and has denied competitors access to the packetized bandwidth and associated

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<sup>9</sup> FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2008* (Jul. 2009) at 3, Table 6 and Chart 10 (incumbent LECS or their affiliates reported 60.4% of total high speed connections; 28.8% of such connections were reported as cable modem).

<sup>10</sup> Broadband Notice of Inquiry at ¶5, n. 4.

<sup>11</sup> See, "United States Continues To Trail In World Broadband Rankings," Broadcast Engineering, May 26, 2008, available at <http://broadcastengineering.com/new/US-continues-trail-world-broadband-rankings-0536>. See also, FCC Public Notice, "Commissioner Copps Reiterates Call For A National Broadband Strategy To Address America's Drop in Broadband Rankings" (rel. Apr. 23, 2007).

fiber transmission facilities of the incumbent LECs.<sup>12</sup> Cbeyond has stated that it is willing to deliver sophisticated IT services, such as virtualized desktops, hosted digital file management, video conferencing, video streaming, cloud computing and robust data protection to small businesses at affordable prices but is unable to do so for many of its customers without access to the greater speed and capacity afforded by unbundled packetized bandwidth.<sup>13</sup>

The Commission is without authority to compel the ILECs or cable operators to make available or market such “big business” services to small businesses. It does have authority, however, to provide competitive carriers that are interested in serving the small business market with the necessary tools to do so. Those tools include unbundled access to packetized bandwidth that competitors can use to customize and design services and applications tailored to the requirements of their small business customers. The need for access to packetized bandwidth will only increase as incumbents deploy more fiber and retire more copper.

Cbeyond correctly asserts that small businesses today often have no choice but to use twentieth century TDM-based DS1 services to compete in a twenty-first century global marketplace.<sup>14</sup> As incumbents transition their networks from circuit switched technology to IP-based technology, TDM-based services are rapidly becoming relics of a bygone era. Verizon

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<sup>12</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 01-338, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003); *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004).

<sup>13</sup> Cbeyond Petition at 3-4, 12-13, 17-20.

<sup>14</sup> *Id.* at 4.

and AT&T have both put the Commission on notice that the growing demand for high capacity services and new technologies is shifting their network infrastructure away from TDM-based technology to packet-based technology.<sup>15</sup> AT&T has alleged that “legacy TDM and copper-based services . . . are rapidly being replaced because they are ill-suited to meet the exploding demand for high-capacity broadband connections,”<sup>16</sup> and has gone so far as to ask the Commission to set a deadline for retirement of the circuit-switched public switched telephone network.<sup>17</sup>

In light of these developments, opening a rulemaking to determine the rights of competitors to access the packet-switched bandwidth of fiber and hybrid loops pursuant to Section 251(c)(3) of the Act is both necessary and in the public interest. Even AT&T has urged the Commission to “invite comment regarding the role of unbundling under 47 U.S.C. §251(c)(3) after the sunset of the PSTN and POTS.”<sup>18</sup> The promotion of competition and competitive choice for consumers are clear goals of the broadband funding authorized by Congress in the American Recovery and Reinvestment Act as well as a central focus of the National Broadband Plan Congress directed the Commission to prepare. Congress instructed the Rural Utilities Service to give priority in awarding broadband loan funds to project applications that will deliver

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<sup>15</sup> See Comments of Verizon and Verizon Wireless filed January 19, 2010 in WC Docket No. 05-25 at 14-15.

<sup>16</sup> Comments of AT&T Inc. filed January 19, 2010 in WC Docket No. 05-25 at 2.

<sup>17</sup> Comments of AT&T Inc. on the Transition From the Legacy Circuit-Switched Network to Broadband – NBP Public Notice #25, filed in GN Docket No. 09-51 on December 21, 2009 at 3.

<sup>18</sup> *Id.* at 26.

end users a choice of service providers.<sup>19</sup> It instructed the National Telecommunications and Information Administration to condition any broadband grants on the awardee's contractual agreement to adhere to the Commission's Broadband Policy Principles,<sup>20</sup> including the principle that "consumers are entitled to competition among network providers, application and service providers, and content providers."<sup>21</sup> Finally, Congress directed the Commission to include in the National Broadband Plan an analysis of the most effective and efficient mechanisms for ensuring broadband access by all Americans and a detailed strategy for achieving affordability of broadband service and maximum utilization of broadband infrastructure by the public.<sup>22</sup>

The best way to increase affordability of broadband services and maximize the utilization of broadband infrastructure is to increase the number of broadband services providers by ensuring that competing broadband service providers have wholesale access to the incumbents' last mile broadband networks, including access to packet-switched transmission capacity. Only meaningful competition will constrain prices and promote the availability of innovative products and services for all market segments, including the small business segment.

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<sup>19</sup> American Recovery and Reinvestment Act, Pub.L.No. 111-5, 123 Stat. 115, 118.

<sup>20</sup> *Id.* at Section 6002(j).

<sup>21</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sept. 23, 2005) at ¶4.

<sup>22</sup> American Recovery and Reinvestment Act, Pub.L.No. 111-5, 123 Stat. 115, 6002(k)(2)(A) and (B).

For the foregoing reasons and those set forth in Cbeyond's Petition for Expedited Rulemaking, COMPTEL respectfully requests that the Commission grant Cbeyond's Petition.

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Respectfully submitted,

/s/

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