

OPEN MEETING ITEM



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BRIAN C. McNEIL
Executive Director

ORIGINAL

COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE



ARIZONA CORPORATION COMMISSION

DATE: DECEMBER 2, 2008

DOCKET NO: T-20497A-06-0802

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

CBEYOND COMMUNICATIONS, LLC
(CC&N FACILITIES BASED)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

DECEMBER 11, 2008

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

DECEMBER 16, 2008 AND DECEMBER 17, 2008

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

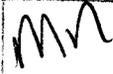
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AZ CORP COMMISSION
DOCKET CONTROL


BRIAN C. McNEIL
EXECUTIVE DIRECTOR

Arizona Corporation Commission
DOCKETED



1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MIKE GLEASON - Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 KRISTIN K. MAYES
7 GARY PIERCE

8 IN THE MATTER OF THE APPLICATION OF
9 CBeyond COMMUNICATIONS, LLC FOR
10 APPROVAL OF A CERTIFICATE OF
11 CONVENIENCE AND NECESSITY TO
12 PROVIDE FACILITIES-BASED LOCAL
13 EXCHANGE AND RESOLD LONG DISTANCE
14 TELECOMMUNICATIONS SERVICES IN
15 ARIZONA.

DOCKET NO. T-20497A-06-0802

DECISION NO. _____

OPINION AND ORDER

12 DATE OF HEARING: September 11, 2008

13 PLACE OF HEARING: Phoenix, Arizona

14 ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey

15 APPEARANCES: Mr. Michael W. Patten, ROSHKA DEWULF &
16 PATTEN, PLC, on behalf of Cbeyond Communications,
17 LLC; and

18 Mr. Kevin Torrey, Staff Attorney, Legal Division on
19 behalf of Utilities Division of the Arizona Corporation
20 Commission.

19 **BY THE COMMISSION:**

20 On December 28, 2006, Cbeyond Communications, LLC ("Cbeyond" or "Applicant") filed
21 with the Arizona Corporation Commission ("Commission") an application for a Certificate of
22 Convenience and Necessity ("CC&N") to provide facilities-based local exchange and resold long
23 distance telecommunications services in Arizona. The Applicant's application also petitioned the
24 Commission for a determination that its proposed services be classified as competitive.

25 On January 17, 2007, the Commission's Utilities Division Staff ("Staff") issued a Letter of
26 Insufficiency and First Set of Data Requests to Cbeyond.

27 On March 19, 2007, Cbeyond filed responses to Staff's First Set of Data Requests.
28

1 On March 23, 2007, Cbeyond filed additional information in response to Staff's Data
2 Requests.

3 On April 27, 2007, Staff issued a second Letter of Insufficiency and Second Set of Data
4 Requests to Cbeyond.

5 On May 31, 2007, Staff issued a third Letter of Insufficiency and Third Set of Data Requests
6 to Cbeyond.

7 On June 5, 2007, Cbeyond filed responses to Staff's Third Set of Data Requests.

8 On October 16, 2007, Applicant filed additional information in support of its application.

9 On May 1, 2008, Applicant filed additional information in support of its application.

10 On July 17, 2008, Staff docketed a Staff Report recommending approval of Cbeyond's
11 application and recommending that Cbeyond's proposed services be classified as competitive.

12 On July 28, 2008, by Procedural Order, a hearing was set to commence on September 11,
13 2008, and other procedural deadlines were established.

14 On August 11, 2008, Cbeyond docketed a Notice of Filing Affidavit of Publication, showing
15 publication of the application and hearing date had been published in the *Arizona Republic*, a
16 newspaper of general circulation, on August 5, 2008.

17 On September 11, 2008, a full public hearing was convened before a duly authorized
18 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Applicant and
19 Staff appeared through counsel and presented evidence and testimony. At the conclusion of the
20 hearing, the Applicant was directed to file, as a late-filed exhibit, Cbeyond's financial statements for
21 2007.

22 On September 12, 2008, Applicant filed its fourth quarter 2007 financial numbers.

23 After receipt of the late-filed exhibits, the matter was taken under advisement pending
24 submission of a Recommended Opinion and Order to the Commission.

25 * * * * *

26 Having considered the entire record herein and being fully advised in the premises, the
27 Commission finds, concludes, and orders that:

28

FINDINGS OF FACT

1
2 1. Cbeyond is a foreign limited liability corporation, incorporated in the State of
3 Delaware and authorized to transact business in the Arizona.

4 2. Cbeyond is a wholly-owned subsidiary of Cbeyond, Inc., a publicly traded
5 corporation.¹

6 3. On December 28, 2006, Cbeyond filed an application for a CC&N to provide
7 facilities-based local exchange and resold long distance telecommunications services within the State
8 of Arizona. The application also seeks a determination that Cbeyond's proposed services be
9 classified as competitive.

10 5. Staff recommends approval of Cbeyond's application for a CC&N to provide
11 facilities-based local exchange and resold long distance telecommunications services in Arizona and
12 that Cbeyond's proposed services be classified as competitive.

13 6. Staff further recommends that:

- 14 a.) Cbeyond comply with all Commission Rules, Orders, and other requirements
relevant to the provision of intrastate telecommunications services;
- 15 b.) Cbeyond abide by the quality service standards that were approved by the
16 Commission for Qwest in Docket No. T-01051B-93-0183;
- 17 c.) Cbeyond be prohibited from barring access to alternative local exchange
18 service providers who wish to serve areas where Cbeyond is the only provider
of local exchange service facilities;
- 19 d.) Cbeyond be required to notify the Commission immediately upon changes to
20 Cbeyond's name, address or telephone number;
- 21 e.) Cbeyond cooperate with Commission investigations including, but not limited
22 to customer complaints;
- 23 f.) Cbeyond's rates be classified as competitive;
- 24 g.) Although Staff considered the fair value rate base ("FVRB") information
25 submitted by Cbeyond, the fair value information provided should not be given
substantial weight in this analysis;
- 26 h.) Cbeyond offer Caller ID with the capability to toggle between blocking and
27 unblocking the transmission of the telephone number at no charge;

28 ¹ Application at 2.

- 1 i.) Cbeyond offer Last Call Return service that will not return calls to telephone
2 numbers that have the privacy indicator activated;
- 3 j.) Cbeyond submit interexchange tariffs which state it does not collect advances,
4 deposits and/or prepayments;
- 5 k.) Cbeyond be authorized to discount its rates and service charges to the marginal
6 cost of providing the services;
- 7 l.) Cbeyond file with the Commission in this docket, copies of the certifications
8 sent to the FCC stating the Company's compliance with the FCC's rules
9 concerning CPNI, and that Cbeyond file these certifications with the
10 Commission for 24 months subsequent to a Decision in this matter; and
- 11 m.) Cbeyond continue operating under the operating procedures established by the
12 Company to ensure compliance with the FCC's CPNI rules as specified in the
13 Consent Decree until further Order of the Commission.

14 7. Staff further recommends that Cbeyond comply with the following conditions and if
15 Cbeyond fails to comply, the CC&N should be null and void, after due process without further Order
16 of the Commission, and that no time extensions should be granted.

- 17 a. Cbeyond shall docket conforming tariffs for each service within its CC&N
18 within 365 days from the date of an Order in this matter or 30 days prior to
19 providing service, whichever comes first. The tariffs submitted shall coincide
20 with the application and shall state that the Applicant does not collect advances
21 deposits and/or prepayments from its customers.
- 22 b. Cbeyond shall:
- 23 1. Procure a performance bond or irrevocable sight draft Letter of Credit
24 in the amount of \$110,000. The minimum performance bond or
25 irrevocable sight draft Letter of Credit amount of \$110,000 should be
26 increased if at any time it would be insufficient to cover advances,
27 deposits, and/or prepayments collected from the Applicant's customers.
28 The performance bond or irrevocable sight draft Letter of Credit
amount should be increased in increments of \$55,000. This increase
should occur when the total amount of the advances, deposits, and
prepayments is within \$11,000 of the performance bond or irrevocable
sight draft Letter of Credit amount.
 2. File the original performance bond or irrevocable sight draft Letter of
Credit with the Commission's Business Office and copies of the
performance bond or irrevocable sight draft Letter of Credit with
Docket Control, as a compliance item in this docket, within 30 days of

1 the effective date of a decision in this matter. The performance bond or
2 irrevocable sight draft Letter of Credit must remain in effect until
3 further order of the Commission. The Commission may draw on the
4 performance bond or irrevocable sight draft Letter of Credit, on behalf
5 of, and for the sole benefit of the Company's customers, if the
6 Commission finds in its discretion, that the Company is in default of its
7 obligations arising from its Certificate. The Commission may use the
8 performance bond or irrevocable sight draft Letter of Credit funds, as
9 appropriate, to protect the Company's customers and the public interest
10 and to take any and all actions the Commission deems necessary, in its
11 discretion, including, but not limited to, returning prepayments or
12 deposits collected from the Company's customers.

13 **Technical/ Managerial Capabilities**

14 8. Cbeyond's witness, Mr. William Weber, Chief Administrative Officer for Cbeyond
15 Inc., parent company to Cbeyond, LLC, testified that Cbeyond currently provides
16 telecommunications services in California, Colorado, Georgia, Illinois, Texas, Florida and Minnesota.
17 (Tr. at 7) Mr. Weber described the company's approach as being "an inch wide and a mile deep,"
18 meaning Cbeyond serves a narrow set of customers - businesses with between five and 249
19 employees - but tries to have deep penetration within its specific market. Mr. Weber testified that
20 Atlanta was the first city Cbeyond provided service in and they have been in the Atlanta market for
21 six years and currently hold 15 percent of the market for businesses with between five and 249
22 customers. (Tr. at 9)

23 9. Cbeyond is also authorized to provide telecommunications services in Massachusetts,
24 Michigan, Missouri, New York, North Carolina, Pennsylvania, Virginia, Washington and the District
25 of Columbia.

26 10. In Arizona, Cbeyond plans to offer a variety of telecommunications services. Mr.
27 Weber testified that Cbeyond has one of the lowest churn rates in the industry and that all of the
28 company's growth has been "organic" and not acquired through acquisition of other companies. He
further stated that in each city where Cbeyond does business 60 new sales employees are hired, with
an average annual salary of \$80,000. (Tr. at 10)

11. Mr. Weber stated that Cbeyond will be providing service using a T-1 line to bring
service to the customers' locations and the entire process will be managed over Cbeyond's private
network. (Tr. at 12)

1 12. As a part of its application, Cbeyond submitted information on its Board of Directors
2 (“Board”) which showed that the Board possesses sufficient managerial experience in the
3 telecommunications industry to provide the services requested in the application.

4 13. Based on Cbeyond’s experience in the telecommunications industry, and the
5 experience of its managerial staff, Cbeyond possesses the technical and managerial capabilities to
6 provide the telecommunications services it is requesting in Arizona.

7 **Financial Capabilities**

8 14. Cbeyond’s witness testified that the company has been growing at over 30 percent per
9 year for the last six years, and that revenues are expected to reach approximately \$350 to \$355
10 million for 2008. He further testified that the company has no debt and has never been through
11 bankruptcy. (Tr. at 10)

12 15. According to Cbeyond’s application, Cbeyond will rely on the financial resources of
13 its parent company.

14 16. Cbeyond filed as a late-filed exhibit, the fourth quarter 2007 financial results for its
15 parent company Cbeyond Inc., and its subsidiaries. According to the docketed press release,
16 Cbeyond, Inc., posted revenues of \$76.9 million, net income of \$12.5 million and total adjusted
17 earnings before interest, taxes depreciation and amortization of \$14 million for the fourth quarter
18 ending December 31, 2007.

19 17. The Company also provided audited financial statements for its parent company for
20 the year ending December 31, 2006. The Staff Report shows the company’s parent listed assets of
21 \$144,393; equity of \$91,108; and a net income of \$7,780 for the above time period.

22 18. Cbeyond’s tariff states it may collect deposits from its local exchange or interexchange
23 service customers.

24 19. All CC&Ns for facilities-based local exchange service must be secured by a minimum
25 bond or irrevocable sight draft letter of credit in the amount of \$100,000.

26 20. CC&Ns for resold long distance service require each Applicant to secure a minimum
27 bond or irrevocable sight draft letter of credit in the amount of \$10,000 if the Applicant may collect
28 prepayments or advances.

1 21. Cbeyond should be required to secure a performance bond or irrevocable sight draft
2 letter of credit in the aggregate amount of \$110,000 for its proposed services.

3 22. Pursuant to Arizona Administrative Code ("A.A.C") R-14-2-1107, if Cbeyond desires
4 to discontinue service in Arizona it must file an application with the Commission, and notify its
5 customers and the Commission sixty (60) days prior to filing the application to discontinue service.
6 Further, Cbeyond's failure to meet the requirements of the rule will result in a forfeiture of Cbeyond's
7 performance bond or irrevocable sight draft letter of credit.

8 23. Cbeyond has the financial capability to provide the services proposed in its
9 application.

10 **Rates and Charges**

11 24. Pursuant to A.A.C. R-14-2-1109, Cbeyond may charge rates for service that are not
12 less than its total service long-run incremental costs of providing service.

13 25. Cbeyond's proposed rates are for competitive services. In general, rates for
14 competitive services are not set according to the rate of return regulation.

15 26. Cbeyond will have to compete with incumbent local exchange carriers ("ILECs") and
16 various competitive local exchange carriers ("CLECs") and interexchange carriers providing
17 telecommunications services.

18 27. In the competitive environment Cbeyond will be operating in, Cbeyond will not be
19 able to exert any market power and the competitive process will result in rates that are just and
20 reasonable.

21 28. Although Staff considered Cbeyond's FVRB in its analysis of the application, Staff
22 concluded Cbeyond's FVRB is zero, and therefore too small to be useful in a FVRB analysis.

23 29. Cbeyond's proposed rate are just and reasonable and should be adopted.

24 30. Cbeyond plans to serve a narrow market consisting of businesses that have between
25 five and 249 employees.

26 31. Pursuant to A.A.C. R-14-2-1308(A) and federal laws and rules, Cbeyond will make
27 number portability available to facilitate the ability of customers to switch between authorized local
28 carriers within a given wire center without changing their telephone number and without impairment

1 to quality, functionality, reliability or convenience of use.

2 32. In compliance with A.A.C. R-14-2-1204, all telecommunications service providers
3 that interconnect into the public switched network shall provide funding for the Arizona Universal
4 Fund ("AUSF").

5 33. Cbeyond will contribute to the AUSF as required by the A.A.C., and shall make
6 necessary monthly payments as required under A.A.C. R-14-2-1204 (B).

7 34. In the areas where Cbeyond is the only local exchange service provider, Cbeyond is
8 prohibited from barring access to alternative local exchange service providers who wish to serve the
9 area.

10 35. Cbeyond will provide all customers with 911 and E911 service where available, or
11 will coordinate with ILECs, and emergency service providers to facilitate the service.

12 36. Pursuant to prior Commission Decisions, Cbeyond may offer customer local area
13 signaling services such as Caller ID and Call Blocking, so long as the customer is able to block or
14 unblock each individual call at no additional cost.

15 37. Cbeyond must also offer Last Call Return service, which will not allow the return of
16 calls to the telephone numbers that have the privacy indicator activated.

17 **Complaint History**

18 38. Cbeyond has not had an application for service denied, or revoked, in any state.

19 39. Cbeyond has no outstanding complaints in Arizona.

20 40. In April 2006, the Federal Communications Commission ("FCC") issued a Notice of
21 Apparent Liability for Forfeiture ("NAL") to Cbeyond for Cbeyond's failure to produce and make
22 public its annual certificate stating Cbeyond had adequate operating procedures to ensure compliance
23 with Customer Proprietary Network Information ("CPNI").²

24 41. For its violation, Cbeyond was liable for a monetary forfeiture of \$100,000 for non-
25 compliance with FCC rules and the CPNI order.

26

27 ² See 47 C.F.R. § 64.2009(e); Implementation of the Telecommunications Act of 1996: Telecommunications Carriers'
28 Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-
accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, Order and Further
Notice of Proposed Rule Making, 13 FCC Rcd 8061(1998) ("CPNI Order").

1 42. Cbeyond's witness testified that in 2005, Cbeyond discovered that it did not have the
2 required letter on file and immediately brought the violation to the FCC's attention and the company
3 began to review its CPNI practices. (Tr. at 23) According to the witness, during the review Cbeyond
4 discovered that it had a written policy regarding the CPNI rules, but that the policies were not being
5 monitored effectively. (Tr. at 23) The witness testified that the FCC found no evidence that the
6 policy had been violated, even without effective monitoring. (Tr. at 23)

7 43. Cbeyond's witness testified that at the same time the FCC began investigating the
8 company's CPNI violation, a competitor, Bell South, alleged that Cbeyond employees had been
9 fraudulently signing customer's letters of authorization ("LOA"). According to the witness, Bell
10 South's allegations were never proven and Bell South was unable to identify one customer's
11 information that had been improperly obtained by Cbeyond employees in violation of the CPNI rules.
12 (Tr. at 24)

13 44. On October 16, 2007, the FCC and Cbeyond entered into a Consent Decree. The
14 Consent Decree states that the NAL is terminated; Cbeyond shall voluntarily contribute to the U. S.
15 Treasury \$200,000; Cbeyond shall annually submit to the FCC certification that it is in compliance
16 with the CPNI rules; and Cbeyond shall continue with operating procedures established by the
17 company to ensure continued compliance with the CPNI rules.

18 45. The witness testified that since the CPNI violation, Cbeyond has instituted an internal
19 audit group, consisting of an attorney, paralegal, and a complaint and operations specialist. The
20 witness stated the audit group monitors the company's compliance and the operations specialist helps
21 to bridge the gap between operations and legal issues. (Tr. at 25)

22 46. Cbeyond's witness stated the company has taken additional steps to ensure the CPNI
23 rules are followed. They include: 1) requiring every Cbeyond employee who comes in contact with
24 customer information to certify annually that they understand the CPNI rules and that violation of the
25 CPNI rules could lead to discipline and termination; 2) Cbeyond has installed a new computer system
26 that monitors each time CPNI information is accessed and the information is stored in a database so if
27 there is an allegation, the company can see who has accessed the information; and 3) each sales
28 branch now has one person who is responsible for verifying that LOAs are signed by customers and

1 filled out properly. (Tr. at 27)

2 47. Staff's Report states the Consent Decree is scheduled to expire on October 5, 2009.

3 48. Staff also obtained complaint information on Cbeyond from five State Commissions,
4 which included California, Colorado, Georgia, Illinois, and Texas. Cbeyond had no complaints filed
5 in California. In Colorado, Cbeyond had 34 complaints filed for the period of June 2006 to June
6 2008, but all have been closed. Staff noted that five of the complaints filed in Colorado were
7 resolved in favor of the customer and included one billing, one cramming and three slamming
8 complaints. In Georgia, Cbeyond had 39 complaints filed from 2001 to 2007, and all have been
9 closed. Three complaints were filed in Illinois from September 2006 to January 2007, and all have
10 been resolved. Cbeyond had 30 complaints filed in Texas from March 2005 to December 2006, but
11 only two of the complaints were resolved in favor of the customer.

12 49. We find Staff's recommendations reasonable, except that Staff's recommendation in
13 Finding of Fact 6 (l), should be modified to reflect that Cbeyond file its CPNI certifications with the
14 Commission for 24 months beginning the first day it begins service in Arizona. Further, Staff's
15 recommendations should be modified to include that if Staff believes Cbeyond is out of compliance
16 with federal or state rules and laws, within that 24 month period, Staff shall seek an Order to Show
17 Cause that requires Cbeyond to appear and show cause why its CC&N should not be revoked.

18 50. The rates proposed herein are for competitive services.

19 51. Applicant's rates, as stated in the proposed tariffs, are just and reasonable and should
20 be approved.

21 CONCLUSIONS OF LAW

22 1. Applicant is a public service corporation within the meaning of Article XV of the
23 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

24 2. The Commission has jurisdiction over Applicant and the subject matter of the
25 application.

26 3. Notice of the application was given in accordance with the law.

27 4. A.R.S. § 40-252 allows a telecommunications company to file an application for a
28 CC&N to provide competitive telecommunications services.

1 IT IS FURTHER ORDERED that the Commission's Utilities Division Staff shall monitor the
2 annual filings ordered herein, and if at any time Staff believes Cbeyond Communications, LLC is out
3 of compliance with federal or state rules and laws, within that twenty-four (24) month period, Staff
4 shall seek an Order to Show Cause requiring Cbeyond Communications, LLC to appear and show
5 cause why the Certificate of Convenience and Necessity granted herein, should not be revoked.

6 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

8
9
10 CHAIRMAN

COMMISSIONER

11
12 COMMISSIONER

COMMISSIONER

COMMISSIONER

13
14 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
15 Director of the Arizona Corporation Commission, have
16 hereunto set my hand and caused the official seal of the
17 Commission to be affixed at the Capitol, in the City of Phoenix,
18 this _____ day of _____, 2008.

19 BRIAN C. McNEIL
EXECUTIVE DIRECTOR

20 DISSENT _____

21
22 DISSENT _____

23 YBK:db

1 SERVICE LIST FOR: CBeyond COMMUNICATIONS, LLC

2 DOCKET NO.: T-20497A-06-0802

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