

TESTIMONY OF BRAD EVANS  
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BEFORE THE  
COMMITTEE ON ENERGY AND COMMERCE TELECOMMUNICATIONS  
AND THE INTERNET SUBCOMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES  
ON  
THE FUTURE OF TELECOMMUNICATIONS COMPETITION  
OCTOBER 2, 2007

Mr. Chairman and Members of the Committee, I am Brad Evans, Chairman of Cavalier Telephone. Thank you for the opportunity to testify here today before this committee. I will briefly introduce Cavalier and then discuss the threat to competition posed by the forbearance petitions pending at the FCC. We need Congressional help to stop these forbearance petitions filed by AT&T, Verizon, and Qwest.

### Introduction to Cavalier

Cavalier Telephone is a competitive telephone company headquartered in Richmond, Virginia. We provide local, long distance, broadband, and IPTV services in about 20 states in the Middle Atlantic, Midwest, and Southeastern United States.

Our company is a “success story” of the new, competitive marketplace mandated by the Telecommunications Act of 1996. Unlike many other competitors, Cavalier embraces the residential market and is adding approximately 25,000 new customers each month. Our high-speed Internet access is second to none, offering speeds of 15 megabits per second for a low monthly price of \$24.95.

Cavalier launched voice service over its first switch in Virginia in 1999. Since that humble beginning, it has grown to become a profitable company with over \$650 million in revenues. We have made significant capital investments, and now own over 8,000 miles in long-haul fiber and 3,000 miles in metro fiber. We have fiber rings in most of our cities, including Richmond, Virginia Beach, Detroit, and Philadelphia. We have also invested enormous amounts in equipment that unleashes the full potential of existing, last mile copper loop plant. In 2007, we are continuing to expand our service area. In fact, Cavalier will expand next week into Pittsburgh, followed by Syracuse and Albany later in the year. See Exhibit A.

Since the breakup of the “Ma Bell” in 1985, much has changed and yet we see history repeating itself. Initially, the breakup resulted in 7 Bell operating companies. By 2007, the Bells had recombined into three Bell operating companies—AT&T, Verizon, and Qwest. In many of the mergers, the Bells promised to compete across region in order to get merger approval. Despite those promises, the Bells have not only refused to compete outside their home regions, preferring to divide the country into three Bell monopoly territories, they have actually strengthened their in-region monopolies.

The three Bell companies—AT&T, Verizon, and Qwest-- continue to hold a *de facto* monopoly on traditional wireline services—local and long distance. Through extensive marketing, mergers and acquisition, and regulatory manipulation they have become the largest providers of broadband and wireless services as well. To that end, in a recent conversation with an analyst, Verizon bragged it would achieve a penetration of 90% in the 30 million homes it passes. See Exhibit B. The Bells control the movement of local telephone traffic across the United States—through control of special access and most transport. As a result, virtually every time an American picks up a phone, wireline or wireless, a Bell operating company gets paid for some portion of that call or service—either by the end user customer or its provider who must pay for access to some part of the Bell network. For the Bells, however, the situation is intolerable because in some places cable and some small ambitious competitive providers—such as Cavalier—have dared to challenge their market dominance.

Overall the Telecommunications Act of 1996 has been a success, bringing competition into many areas. I am surprised to see the Bells, despite having achieved re-monopolization, now challenging some basic provisions of the Act, which were the foundations of Cavalier’s success. I speak of unbundled access to the “last mile” of the legacy facilities that have been in place, in some cases, for over 100 years. The Telecommunications Act requires Verizon, AT&T, and Qwest to not just interconnect their networks with Cavalier’s network, but also to provide Cavalier with access to local loops to reach individual customers. These last-mile facilities are essential to Cavalier’s

ability to compete. They have also allowed Cavalier to provide new innovations, by deploying startling, new uses for existing copper loop plant.

### Cavalier's IPTV Over Copper

Cavalier is an industry pioneer in a competitive TV service that uses MPEG 4 video compression to provide over 150 channels of television over Cavalier's existing DSL network—all delivered over traditional copper loops. The service has clear digital picture quality, an interactive programming guide, video on demand, and other advanced features. We offer video and music channels, local telephone service, and high-speed broadband, all at a significant savings to consumers compared to current alternatives. A Cavalier IPTV customer can add premium channels or just stick to a basic package that includes cable standards like MTV, ESPN, and CSPAN alongside broadcast networks like ABC, NBC, CBS, and Fox.

The Cavalier TV network currently has thousands of customers in Richmond and Virginia Beach. We are bringing that service to Detroit and Philadelphia over the next year, and then to all of our major markets. Unlike Verizon's FiOS, our TV service runs over existing copper loops. That means that we can serve older neighborhoods with copper facilities, not just gated suburban communities with newly built fiber networks. We simply stream our TV signal over the existing DSL network. If you can get Cavalier's high speed DSL service, then you can get Cavalier TV. We serve the inner city, not just McMansions in the exurban fringe.

### Consumers Save With Cavalier

Cavalier also offers significant savings to customers, as shown in the chart below, and thereby makes high speed DSL services more affordable to consumers. For example, we offer a promotional package of telephone and high-speed Internet service for under \$40 a month, compared to almost \$70 for similar packages from Verizon, AT&T, and Comcast.

A similar promotional package that adds Cavalier's IPTV service sells for under \$80 a month, compared to about \$100 a month with the larger competitors.

	Verizon	AT&T	Comcast	Cavalier
<b>Bundle for phone &amp; Hi-Speed Internet</b>				
Best Rate for New Customer	\$69.99	\$69.95	\$66.00	\$39.90
Modem Fees & Voice Mail (AT&T)	\$29.99	not included	\$3.00	\$0.00
Total for Promotional Period	\$99.98	\$69.95	\$69.00	\$39.90
Promo period covers:	Six months, after 1st month free.	ongoing	12 months	Six months. Other promotional offers apply.
Then customer pays:			\$97.90	\$49.90
Restrictions:	Two year term		No term	No term
	Customer must pay partial install fee if disconnects all services before 12 months.	Modem shipment fee of \$19.95 + purchase of modem at \$49.95	Installation charges apply.	No restrictions.

	Verizon FiOS	AT&T	Comcast	Cavalier
<b>Bundle for phone, Hi-Speed Internet, TV</b>				
Best Rate for New Customer	\$99.00	\$102.98	\$99.00	\$79.95
Set Top Boxes & Modem Fees	\$4.99	\$5.00	\$3.00	\$0.00
Total for Promotional Period	\$103.99	\$107.98	\$102.00	\$79.95
Promo period covers:	12 months	ongoing	12 months	12 months
Then customer pays:	Unspecified increases		\$135.40 - \$212.95	\$99.95
Restrictions:	Two year term	One year term	No term	No term
	Lease of additional equipment required for digital programming.	\$49.95 activation fee. 100 channel Dish Network package. Pricing available only for on-line orders.	Installation charges apply.	Customer must pay partial install fee if disconnects all services before 12 months.

Threats to Copper and Competition

These customer savings and innovations are in jeopardy. As part of its FiOS rollout, Verizon is threatening to remove, or removing, copper loop facilities built over the past century at the expense of customers who paid monopoly rates for telephone service. It is the copper facilities that served as the critical support beam upon which the 1996 Telecom Act was based and continues to be the essential link for our nation's coast-to-coast telecommunications infrastructure. As it rolls out FiOS, Verizon is ripping copper out of the ground or disconnecting it from consumers' homes. Why? Because Verizon

wants to remove the copper facilities that competitors can use, replacing it with fiber that the FCC has exempted from any unbundling (sharing) requirements. We believe the FCC should clarify that “retirement” as set forth in current rules refers to the actual physical removal of copper and that in all other circumstances copper loops remain subject to unbundling.

Competitive carriers do not expect Congress to cure its concerns with regard to copper retirement. Instead, in January, 2007 17 competitive carriers, including Cavalier, filed a petition for rulemaking and clarification with the FCC. That petition asks the FCC to revise its rules to assure that the public interest in provision of competitive services over legacy copper loops is protected from ILEC incentives to harm competition.

Copper retirement is a slowly evolving threat, driven by the Bell operating companies, especially Verizon’s, own internal timeline of fiber deployment. I’d like to contrast that and turn my attention now to, the Bells’ use of “forbearance” which poses an immediate threat to competition.

A number of forbearance deadlines are rapidly approaching. For example, October 11, 2007 is the statutory deadline for the FCC to decide AT&T’s broadband so-called “me, too” forbearance petition. These petitions seek deregulation of certain broadband services based on the theory that Verizon was granted the same relief in a petition that was “deemed granted” on March 20, 2006. The statutory deadline for Verizon’s “six MSA” forbearance petition is on December 5, 2007, followed by the statutory deadline for Qwest’s “four MSA” forbearance petition on April 28, 2008. These petitions all present grave threats to competition, and all are based on insufficient evidence and—in the case of Verizon—completely inaccurate evidence, even as admitted by Verizon itself.

Unless the FCC rejects the pending forbearance petitions, consumer choice in ten major cities will be in jeopardy. Nationwide access to advanced broadband services provided by AT&T will be in jeopardy. Past forbearance petitions have been limited to much smaller markets like Omaha, Nebraska and Anchorage, Alaska. However, the Bells are now

seeking forbearance in major markets like New York, Boston, and Denver. See Exhibit C. Cavalier alone has over 90,000 residential customers and another 50,000 business lines affected by the pending Verizon petitions in the Philadelphia and Virginia Beach MSAs. Those customers will lose the benefits of the innovative services and the savings mentioned above, if Cavalier loses its current access to copper “last-mile” facilities. Those petitions should therefore be rejected, for reasons that I will elaborate below.

### What Forbearance Means

When we first looked at Section 10 of the Telecommunications Act, we were encouraged. Forbearance seems designed, on its face, to promote competition and foster just and reasonable pricing. As an entrepreneur, I generally favor free markets and a robust competitive marketplace. Section 10 enables the FCC to grant forbearance from enforcement of the standards of the Act if:

- (1) Enforcement is unnecessary for just and reasonable rates;
- (2) Enforcement is unnecessary to protect consumers;
- (3) Grant of forbearance is consistent with the public interest and will promote and enhance competition.

To determine how a grant of the forbearance petitions would affect our customers, Cavalier has repeatedly asked Verizon what it will offer, and at what price, in place of the current access to unbundled copper loops. Verizon has offered no answer. There is simply no substitute for those loops today. Resale is no substitute, because it is not real competition and because Cavalier is a facilities-based company that uses its own fiber rings and equipment. As such, we cannot just shift to a resale mode—that would not allow us to offer our full range of innovative, high-speed DSL services or to continue developing new services over existing copper loop plant.

This brush-off is surprising given that Cavalier is a very large customer of Verizon. For plain copper two wire loops (over which we can provide IPTV and other advanced services), Cavalier pays Verizon on average \$3.3 million a month or \$36 million

annually. For high capacity T1 unbundled loops and transport, we pay an additional \$1 million a month, or \$12 million annually. For other services for which Verizon has a monopoly—collocation, special access, switched access—we pay an additional \$2 million a month or \$24 million annually.

Yet even as a \$72 million-a-year customer of Verizon, we are offered no opportunity for a face-to-face negotiation with Verizon on loop access or even a commitment that it will respond by a certain date—basic courtesies that customers of that scale could reasonably expect. Basic economics suggests that a monopolist does not have to negotiate, but can simply dictate. We are seeing that behavior by Verizon with its “six MSA” Forbearance Petitions.

#### McLeodUSA’s Experience

The experience of McLeodUSA Telecommunications (“McLeod”) vividly illustrates the consequences of “life after forbearance” and “wait for a commercial agreement.” After the FCC granted Qwest’s forbearance petition for Omaha, McLeod was unable to get a suitable commercial agreement from Qwest. McLeod learned that critical evidence on which the FCC relied was filed the day the petition was granted. McLeodUSA was never given an opportunity to respond.

McLeod thus lost Omaha, not based on a fair and open evidentiary proceeding, or even a complete record. Instead, the FCC’s decision seems to have been based on a single piece of evidence that was submitted 15 months after the initial proceeding was filed, evidence that was submitted at the last minute by a cable company with no direct stake in forbearance. McLeod continues to battle for Omaha in a petition for modification filed before the FCC, but that petition has not received any response from the FCC. With no other alternative, McLeod has announced that it will withdraw from that market. And other CLECs, Eschelon and Integra, abandoned their business plans to enter Omaha at all as a result of that Commission Order. Cavalier does not want to be in that same boat in Philadelphia, Pittsburgh, and Virginia Beach.

### Opposing Mass Market Forbearance

The Bell companies like to complain (falsely) that competitive carriers never disclose their numbers, so Cavalier wishes to present the following figures for your consideration:

- 140,000 Cavalier telephone lines (including over 90,000 residential customers) will be affected if the FCC does not reject Verizon's "six MSA" Forbearance Petitions by December 5, 2007.
- Cavalier pays Verizon about \$72 million per year. Verizon consistently seeks higher prices for copper last mile "loops" and other services, but then claims that in other proceedings that the copper facilities are "worthless" or should be abandoned.
- Cavalier buys \$12 million per year in special access from each of Verizon and AT&T for our business services. Cavalier only purchases special access where we do not have our own facilities, unbundled access is unavailable, and other competitive alternatives are not available. Cavalier does not do business in the Qwest region. Cavalier is almost exclusively dependent on the Bells for "last mile" access. In the mass market, focusing on residential customers, special access is not available as there is no available special access for the types of copper loops we buy. Resale services, a state established discount off the Bell retail offerings, are not a viable offering for a small business trying to compete with the Bells because of insufficient margins and they are not suitable for our full suite of products.
- Months ago, at the beginning of the Verizon Six MSA forbearance proceeding, competitive providers purchased and filed commercially available data from

- GeoResults that show the amount of CLEC “last mile” facilities to commercial buildings in each MSA by wire-center. For the price of approximately \$5,000 per market, that information, which is from a neutral source, is readily available and has, in fact, been used by Verizon and the other Bells in other FCC proceedings. Thus, it is untrue that the Bells could not have produced detailed market data about the extent of competitive facilities deployment. We can only surmise that their failure to buy it and submit it is an admission that the markets are far from being competitive.
- Verizon’s business is booming. On July 30, 2007, Verizon reported a 3.4% increase in Second Quarter revenues in legacy Verizon consumer markets, more than double the rate of growth in First Quarter, 2007. In addition, Verizon reported a 10.9% growth in average revenue per unit in these markets. These results indicate that not only is Verizon growing in traditional wireline markets, it is getting more profitable in those markets. More recently, Verizon informed analyst Tim Horan with CBC Times that neither the economic or regulatory environment is currently impacting the company. **In fact, Verizon reports that it now passes 30 million homes and expects to provide service to 90% of these homes.** See Exhibit D.
  - 43 other small business companies from all over the country have joined Cavalier in opposing the forbearance petitions, because they threaten all true competition to the Bells. If you add together the customer counts of the competitors opposing the pending forbearance petitions, you can see that the FCC has an imminent national crisis on its hands, one that cannot be remedied by hollow promises of “commercial agreements” offered by *de facto* monopolist with no incentive to negotiate.
  - The Public Service Commissions of Massachusetts, New Hampshire, New Jersey, New York, Delaware, Pennsylvania, Virginia, Arizona, Colorado, Minnesota, and Washington have all filed strong comments in opposition of the pending

- forbearance petitions. In addition, 11 state agencies and departments including, the National Association of Consumer Advocates has opposed the pending forbearance petitions. Sixteen other parties have filed in opposition of these forbearance petitions. No public service commission or consumer advocate group has filed in support of the pending forbearance petitions.
- Between the pending Verizon Six MSA Forbearance Petitions and Qwest Four MSA Forbearance Petitions 47 million Americans are affected by the pending petitions. See Map Exhibit B.

#### Congress Should Fix the Forbearance Process.

What is happening here is that the forbearance process is deeply flawed. We understand that Section 10 is part of the Telecom Act. Its requirements are clear—the statute lays out the requirements. Yet Cavalier believes that forbearance has been abused by the Bell companies who are seeking to turn back the clock on large portions of the Telecommunications Act of 1996. We are also very concerned that the forbearance petitions filed by Verizon, AT&T, and Qwest will simply be “deemed granted” – eliminating “last mile” facilities – unless three FCC Commissioners vote against them.

The “deemed granted” language in Section 10 of the Telecommunications Act means that the FCC can change the law, and change the very foundation of the Act, without ever voting, without considering the evidence, and without giving competitors a chance to refute the allegations of the Bell companies. Even if the Bell companies fail to make the showing required under Section 10, the pending forbearance petitions can still be granted simply by the FCC’s inaction. As the founder of a successful company created on the promise of the Telecommunications Act, I find such a possibility to be astounding.

The specter of “deemed granted” petitions might seem hypothetical or improbable to you. It should not, because it has already happened. On March 20, 2006, a forbearance petition filed by Verizon was “deemed granted” without an FCC vote. According to later information provided by the FCC’s General Counsel, it turned out that the FCC was deadlocked in a 2-2 tie. What exactly was granted? What was an affected carrier allowed to appeal? No one knows, because the scope of the grant was never articulated in a formal order. I doubt that Congress intended Section 10 to permit such an illogical result. Now, with a full complement of five commissioners, we believe that a better chance exists that a majority vote will occur and that a written order will be issued. However, if one commissioner recuses himself or herself, or does not believe that the record is sufficient, then another petition could again be “deemed granted.”

The question I ask is whether Congress really intended to hand the FCC the ability to terminate basic interconnection requirements of the Telecommunications Act of 1996 using a short cut process. Did Congress really intend that the FCC could reach such a result without any showing of data by the petitioner, any meaningful analysis of data submitted at the 11<sup>th</sup> hour, or without the benefit of a vote or formal order?

In addition to these two issues, the forbearance process has been tainted with procedural irregularities, including those summarized in the table below.

Petition	Date Granted	Procedural Irregularity
Qwest Omaha Petition	September 16, 2005 (order not released until Dec. 2, 2005)	Geographic market definition was based on evidence by Cox Cable filed at 8:11 on the evening of the grant; parties never given chance to refute or even examine evidence upon which FCC relied
Anchorage Alaska UNE Petition	December 28, 2006 (order not released until Jan. 30, 2006)	Parties to case without service in Anchorage deemed to lack standing to appeal; yet precedence stands
Verizon Broadband Petition	March 20, 2006 by press release	“Deemed Granted” when FCC failed to release an order

Congress must require the FCC to remedy such procedural deficiencies before more harm is done. Omaha was an unusual market, with few landline competitors other than

McLeodUSA. Alaska had even fewer competitors- a lone cable company that may have had more lines than the Bell and could ultimately use its own facilities in lieu of “last mile” copper.

In stark contrast, the pending petitions strike at the core of the U.S. telecommunications market, reaching coast-to-coast and embracing Boston, Denver, Minneapolis, New York, Philadelphia, Phoenix, Pittsburgh, Providence, Seattle, and Virginia Beach. These petitions affect not just the named municipalities, but also the surrounding Metropolitan Statistical Areas, some of which stretch across several states. For example, the Philadelphia MSA includes wire centers in New Jersey and Delaware as well as Philadelphia and all of its suburbs. In sum, over 47 million customers across the United States will be affected by the pending forbearance petitions, as summarized in the table below.

Put another way, Omaha and Anchorage involved 9 and 4 wire centers respectively, while approximately 800 wire centers (791 to be exact) are at issue in the Verizon Six MSA Forbearance Petitions.

<u>Petition</u>	<u>Statutory Deadline</u>	<u>Affected Area</u>	<u>Affected People</u>	<u>Services</u>	<u>Procedural Irregularity</u>
AT&T Petition	October 11, 2007	Nationwide-AT&T refused to provide local data	ENTIRE US	All packet-switched and dedicated high-cap services except “TDM” DS1 and DS3	No local data filed, no showing of affect on competition, just and reasonable pricing, or other forbearance standard
Qwest Petition* (Refilled day after withdrew identical petition)	September 12, 2008	Nationwide-despite refilling petition no local data has been provided	ENTIRE US	All packet-switched and dedicated high-cap services except “TDM” DS1 and DS3	7 day notice and comment proceeding- no reply comments; identical to prior petition except word “recently” deleted
Verizon Six (6) MSA Petitions	December 5, 2007	NYC, Boston, Philadelphia, Pittsburgh, Providence, and Virginia Beach	34.4 million	Services Available Under Section 251 including DSO, DS1, DS3 loops and transport;	Despite Omaha Precedent, no reliable wire center data presented 13 months after petition filed;

		MSAs		interstate switched access	Verizon has admitted e911 data is overstated by 100% for business market.
Qwest Four (4) MSA Petitions	April 28, 2007	Seattle, Phoenix, Minneapolis, and Denver MSAs	12.75 million	DSO, DS1, DS3 loops and transport; interstate switched access	Despite Omaha precedent, no reliable wire center data presented

Congress Must Act

Congress cannot ignore this situation, given the geographic scope, the number of consumers and businesses that will be affected, and the harmful impact on competition under the Telecommunications Act of 1996. Access to “last mile” facilities is critical to Cavalier and other competitive providers. Because we use our own facilities and control our own telephone infrastructure up to the last mile, we are able to bring new and innovative services to our customers at considerable savings. I am here today to ask that you urge the FCC to reject the brazen attempts of Verizon, AT&T, and Qwest to use the forbearance process to end run the Telecommunications Act and its requirements that the Bell companies provide access to the “last mile” as set forth in Section 251 of the Act.

Without access to copper “last mile” facilities, innovations like competitive IPTV will not continue. Moreover, our ability to provide service to our substantial base of over 750,000 customers will be in jeopardy. In addition, the service of approximately 47 million other Americans will be left to the whims of the duopoly of Bell-cable duopoly.

Congress should thus demand from the FCC how the public interest will be served, and how just and reasonable pricing can possibly be preserved, if competitors like Cavalier can no longer access the copper network, or can access it in limited areas and only at overblown prices.

We ask Congress to urge the FCC to “just say no” to the Bell misuse of the Section 10 forbearance standard by:

- (1) rejecting all pending forbearance petition based on failure to meet the statutory standards when filed;
- (2) establishing a rule confirming that APA notice-and-comment rules apply to petitions for forbearance;
- (3) establishing a rule specifying that the forbearance petitioner has the burden of proof;
- (4) establishing rules governing the format and content of forbearance petitions, including a “complete-as-filed” requirement and a requirement that the petitioner demonstrate that it has satisfied each and every component of the Section 10 test;
- (5) establishing Rules governing protective orders and *ex parte* filings; and
- (6) establishing Rules encouraging state commission input.

Only action by Congress will require the FCC to take the foregoing actions, which are necessary to preserve the public interest, promote just and reasonable prices, and to prevent the evisceration and untimely demise of competitive alternatives spawned by the Telecommunications Act of 1996.

Mr. Chairman and Members of the Committee, thank you again for this opportunity to share our views with you. We look forward to working with you in any way that might be helpful in preserving competitive choice for all Americans.