Outline of Remarks

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Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers

Cavalier Telephone Timeline

- Formed in **1998** to use own switches and fiber network to reach residential and small business customers with unbundled loops
- Began providing competitive local and long-distance service in Virginia in **1999**
- Expanded into northern Virginia, Pennsylvania, and Maryland, and into digital subscriber line (DSL) service, in **2000**
- Acquired assets of Conectiv Communications, Inc. in **2001**, expanding into Delaware and New Jersey
- Acquired assets of Net2000 in **2002**, expanding mid-Atlantic customer base and adding District of Columbia
- Expanded into voice over Internet protocol services in **2003**, through new Phonom affiliate
- Acquired Dominion Telecom in **2004**, expanding into long-haul segment throughout Eastern United States and into Canada
- Pioneered in providing Internet protocol television (IPTV) in **2005**, through proprietary technology used to carry MPEG4
- Acquired Talk America in **2006**, expanding into local markets in Ohio, Michigan, and other areas
- Expanding into Albany, Buffalo, Pittsburgh, Syracuse as additional local markets in **2007**

Cavalier Telephone Overview of Current Operations

- Largest competitive local carrier (non-incumbent, non-independent telco, non-CATV) in Virginia, Pennsylvania, and Michigan
- Approximately 750,000 retail lines throughout service area that includes Northeast, Southeast, and Midwest
- Using incumbent's last-mile copper facilities to bring low-cost IPTV to residential customers (***example***: $79.95 "triple play")
- IPTV service launched in central and eastern Virginia, with rollout moving north in 2007 and beyond
- Innovating in data or broadband over copper last-mile facilities (***example***: 15 Mbps Ethernet over copper)
- Competitive residential pricing (***example***: $24.95 local telephone service package)
- Competitive offerings for small business (***example***: "SmarT" offering data and voice over single T1 connection)

Regulatory Barriers to Entry

- Local government barriers to entry (experience in Maryland compared to experience in Virginia)

- Local government opposition to new CATV or IPTV entrants (***example***: *Richmond v. Cavalier Telephone*)

- State government aids to entry (IPTV legislation in Virginia and Michigan)

- Federal government aids to entry (unbundling duties, competitive video franchising rules, elimination of video exclusivity in multi-tenant environments, Congressional investigation of loop qualification database)

- Federal government barriers to entry, on a broader canvas (Congressional variability, FCC's myopic and overly optimistic focus on intermodal competition, cabining of antitrust law by *Trinko*, *Credit Suisse v. Billing*, and perhaps *linkLine*)

- Federal government barriers to entry, individual instances of regulatory capture (incumbents' sustained and often vitriolic efforts to challenge established regulations, to pursue ill-supported 271 applications, to win approval of mergers that harm consumers; and to roll back legislation through regulatory forbearance based on ideology instead of facts)

- Lack of meaningful and effective enforcement mechanisms at the FCC and at state PUCs

Private Barriers to Entry

- Incumbent local exchange carriers' constant pressure on regulators (forbearance petitions, unbundling rules, UNE pricing, 271 applications, metrics and performance assurance plans, fiber-to-the-home and fiber-to-the-curb, special access pricing) requires competitors like Cavalier to respond, disproportionately raising competitors' costs[1]

- Incumbent local exchange carriers' operational delays and obstacles., and failure to comply with legal or contractual obligations (***examples***: collocation space, aerial make-ready, unbundled DS0 loop provisioning, directory listing problems, collocation power charges, parallel provisioning of collocation space and transport, unbundled T1 pricing and provisioning, access to customers served by DLC, carrier access billing, operations support systems backbilling, access trunk port backbilling, dark fiber transport between "non-impaired" end offices, problematic tactics in the negotiation and adoption of interconnection agreements)

- Incumbent local exchange carriers' policy of consolidation and non-competition (zero out-of-area competition by RBOCs)

- Private multi-tenant landlords as barriers to entry (growing refusal to allow access for installation or repair)

- Electric utility as barrier to entry (pole access, pole make-ready, and pole rental)

- Organized labor as barrier to entry (experience with non-exempt conduct by IBEW Local 98 in Philadelphia)

- Acquisition of programming for IPTV (content providers' disallowance of tiers by requiring more channels in basic service, cable television's control of vertically integrated services such as sports programming

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[1] Some authors have argued that predation in the form of litigation before regulatory, licensing, and other adjudicatory bodies is more likely because its reward are immediate. A predatory firm can protect supracompetitive prices and raise new entrants' costs simply by engaging the process. Even efforts that are ultimately unsuccessful can produce an immediate benefit in terms of delaying new entry and raising rivals' costs. *See*, *e.g.*, R. Bork, The Antitrust Paradox, at pp. 47-49 (Basic Books 1978); R. Balmer, Sham Litigation and the Antitrust Laws, 29 Buff. L. Rev. 39 (1980); H. Hovencamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213, 276-280 (1986).

Pending or Looming Challenges to Facilities-Based ("Intramodal") Competitors

- Loss by attrition of unbundled last-mile and transport facilities (loops served by DLC, loops served by FTTC or FTTH, transport between "non-impaired" end offices)

- Potential massive loss of unbundled last-mile and transport facilities through forbearance petitions (***example***: Verizon's "Six Cities" petitions; failure of Omaha experiment)

- Veto on innovation through unnecessary and anticompetitive copper retirement (displacement of multiple opportunities over unbundled last-mile facilities)

- Special access pricing to competitors (pricing flexibility rules based on mistaken notion of competitive market, particularly when viewed in tandem with incumbents' elimination of UNE options), and special access pricing and terms to retail consumers

- Broadband forbearance petitions (loss of mode of entry through "enterprise broadband services") and potential hidden effects of pricing flexibility

- Anticompetitive impact of "death by a thousand cuts" (***example***: uptick in Verizon backbilling 12/06-5/07)

- Multi-year delay in updating intercarrier compensation and Universal Service Fund (who will pay for what?)

- Loss of protections under Section 271 if incumbent assets are sold to a non-Bell operating company (***example***: FairPoint)

Impact on Consumers

Less price competition

- Incumbents' predation through abuse of government process raises competitors' average cost per unit by substantially more than the incumbent expends through litigation and regulatory challenges

- Incumbents' refusal to comply with legal or contractual obligations has a similarly asymmetric effect on competitors

- Competitors' prices increase directly when incumbents raise wholesale prices, whether by increasing UNE prices at state commissions, by any success in continuing challenges to TELRIC in court and at the FCC, or by increasing special access prices (***example***: the 2004 elimination of UNE-P led the "old" AT&T's to stop marketing local service immediately, followed three years later by AT&T's October 12, 2007 Virginia petition to raise residential rates above the retail price ceiling, *see* copy available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519809041)

Innovation

- Loss of facilities means that residential consumers will not see "state-of-the-art" new services such as IPTV over copper loops

- Loss of facilities also means that small business customers will not see further innovations like DSL or multi-use T1 circuits

- New intermodal competition depends upon existence of intramodal competition, such as backhaul and redundancy provided to wireless carriers by competitive metro and long-haul fiber providers

Externalities

- Without POTS over copper, residential consumers no longer have a line-powered back-up for voice service, or a line-powered back-up for dial-up Internet service (problem in ice storms, hurricanes)

- Without competitive providers, emergency responders and government and military units lack an alternative source of communications (and may lose an extant solution to communications issues)