ORAL ARGUMENT IN THIS CASE HAS NOT BEEN SCHEDULED.

Nos. 07-1425 and 07-1487

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CABLEVISION SYSTEMS CORPORATION

and

COMCAST CORPORATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an
Order of the Federal Communications Commission

**INITIAL BRIEF OF AMICUS CURIAE
BROADBAND SERVICE PROVIDERS ASSOCIATION
SUPPORTING RESPONDENTS AND
AFFIRMANCE OF THE ORDER BELOW**

Harry F. Cole
Paul J. Feldman
FLETCHER, HEALD & HILDRETH, PLC
1300 NORTH 17TH STREET - 11TH FLOOR
ARLINGTON, VA 22209
703.812.0400

*Counsel for Amicus Curiae
Broadband Service Providers Association*

August 20, 2008

Certificate as to Parties, Rulings and Related Cases

Pursuant to D.C. Cir. R. 28(a)(1), undersigned counsel hereby certifies as follows:

A. Parties and Amicus

All Parties, Intervenors, and the Amicus appearing in this Court are listed in the Brief for Petitioners Cablevision Systems Corporation and Comcast Corporation. A disclosure statement in compliance with Circuit Rule 26.1 relative to Amicus Broadband Service Providers Association is included immediately after this Certificate.

B. Ruling Under Review

References to the ruling at issue appear in the Brief for Petitioners.

C. Related Cases

This matter has not previously been before this Court. Counsel are aware of no related cases currently pending in this Court or in any other Court.

/s/ Harry F. Cole
Harry F. Cole

August 20, 2008

Rule 26.1 Statement

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Amicus Broadband Services Providers Association ("BSPA") states that it is an unincorporated trade association, with no corporate parents or subsidiaries, whose members have no ownership interest in it of any kind. The BSPA's purpose is to promote and support the development of a competitive, facilities-based, broadband industry that will facilitate increased customer choices and lower prices, and provide critical network diversity.

/s/ Harry F. Cole
Harry F. Cole

August 20, 2008

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Glossary

BSPA	Broadband Service Providers Association
BSPs	Broadband Service Providers
CA2C	Coalition for Competitive Access to Content
MVPD	Multichannel Video Program Distribution
OPASTCO/ITTA	Organization for the Protection and Advancement of Small Telephone Companies/ Independent Telephone and Telecommunications Alliance
RSN	Regional Sports Network

Statement of Amicus's Interest

The members of Amicus Broadband Service Providers Association ("BSPA") provide multichannel video program distribution ("MVPD") services in competition with, *inter alia*, traditional cable television operators. The focus of the FCC's action below is a statutorily-mandated prohibition against exclusive programming contracts between (a) cable TV operators and (b) cable programming suppliers affiliated or vertically integrated with those cable TV operators. In the view of Congress and the FCC, such exclusive contracts between affiliated entities impede competition by favoring entrenched, incumbent cable operators to the detriment of new competitors.

The prohibition in question, initially imposed in 1993, is intended to foster competition in the MVPD industry by assuring a level playing field for new entrants. BSPA's members are all such new entrants, seeking to compete against established cable TV operators. They are therefore plainly within the scope of the prohibition's intended protection and they would be harmed if the FCC's action below extending that prohibition were to be reversed by this Court. Pursuant to Fed. R. App. P. 29 and Circuit Rule 29, Amicus has obtained permission to file from this Court. *See* Order filed herein on January 14, 2008.

Summary of the Argument

Promoting competition in the provision of multichannel video services has long been the policy of Congress and the FCC. Such competition results in numerous benefits to consumers, not the least of which is lower prices.

In 1992, Congress directed the FCC to prohibit exclusive programming agreements between cable TV operators and cable programming providers with which those operators were affiliated or vertically integrated. Congress found that these agreements obviously favored incumbent cable operators and disfavored any new entrants seeking to compete with those cable operators. The prohibition against such agreements was intended to promote competition in the multichannel video industry by leveling the playing field for all competitors in regards to the critical issue of access to programming.

Congress called for the prohibition to be initially in effect for 10 years, with the FCC expressly authorized to extend the prohibition thereafter if the agency determined such extension necessary to preserve and protect competition. In the Order below, the FCC found that the prohibition remains necessary. Accordingly, the FCC retained the prohibition for an additional five years.[1]

Before this Court the Petitioners launch a broadside attack against the FCC's action, but their arguments are unavailing, as demonstrated in the Respondents' brief.

Of particular concern to BSPA is the fact that, at various points in their brief, Petitioners' arguments suggest that the competitive marketplace at issue here is limited to two types of participants: (1) incumbent cable operators and (2) competitors that are very large, well-established companies (including, for example, Intervenors AT&T and Verizon). As depicted by Petitioners, the competitors to the incumbent cable operators have endless financial resources sufficient to mitigate the harm that would occur if the exclusive contract prohibition were eliminated.

Such arguments ignore the realities of the competitive marketplace. In fact, the competitive mix also includes numerous relatively small entities whose individual resources are exponentially more limited than those of the

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[1] *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Sunset of Exclusive Contract Prohibition*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) ("*2007 Order*") at paragraph 1 (JA ___).

Petitioners or the Intervenors. BSPA is comprised of precisely such smaller competitive entities. The FCC's action was, as indicated above and in detail below, intended to foster competition from a broad range of new entrants, including very large companies (such as Intervenors), as well as far more modest entities, such as BSPA's members. The prohibition against exclusive programming agreements at issue here was intended to protect <u>all</u> potential competitors, large and small.

To the extent that Petitioners argue that the exclusivity prohibition may not be necessary to protect new entrants to the MVPD marketplace, Petitioners mischaracterize the true lay of the competitive land. Whatever the merits of Petitioners' claims of the competitive strength of such companies as Verizon and AT&T – and BSPA believes that those claims have no merit – Petitioners' claims fail completely to address the fact that the exclusivity prohibition is of critical importance to smaller competitors such as BSPA's members.

ARGUMENT

I. Introduction -- Legislative and Regulatory Background

This case is about the future of competition in the provision multichannel video programming distribution services[2] to millions of American consumers. Originally, MVPD services were provided only by cable TV operators, each enjoying monopoly control within its respective service area. As the industry developed from the early 1950s through the 1980s, numerous cable programming services were developed or purchased by large incumbent cable operators. While potential competitors to the incumbent cable TV operators may, as a matter of law, have been able to enter the market during this period, very few attempted to do so, and even fewer of those competitors succeeded. The original competition offered a "me too" cable TV service that required taking significant market share from the established incumbent to be financially successful. When financial

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[2] "Multichannel video programming distributors" ("MVPDs") are entities that make available for purchase, by subscribers or customers, multiple channels of video programming. *See* 47 U.S.C. §522(13). MVPDs include not only incumbent cable TV operators, but also competitive video providers such as broadband service providers and providers of direct broadcast satellite services. While the term broadband service providers ("BSPs") could generically refer to a wide variety of entities, in this Brief the term will refer only to those entities that are ***competitors to incumbent cable operators***, that provide ***wireline*** service, and that are ***small local or regional*** providers (as opposed to companies that provide nation-wide service).

success could not be demonstrated, the investment in direct competition to incumbent cable operators did not develop. The accretion of competitive advantages favoring the incumbent monopolistic cable industry deterred competition.

In 1990, the FCC concluded that vertically integrated cable operators could, and did, deny potential competitors access to the programming of the cable operators' programming affiliates.[3] The FCC thus recommended that Congress promote the emergence of multichannel video competitors by prohibiting vertically integrated programming services from unreasonably refusing to deal with competing multichannel providers.[4]

In response to those and other concerns about anti-competitive behavior by incumbent cable TV operators, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable

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[3] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 1990 Report to Congress, 5 FCC Rcd 4962, 4972-73 (1990).

[4] *Id.* at 4975.

Act")[5], the express goal of which was to "promote competition in cable communications…."[6]

Congress explicitly recognized that competition to the incumbent cable TV monopolies could not exist, much less flourish, without new competitors having access to important programming resources. Accordingly, the 1992 Cable Act included new Section 628 of the Communications Act. Congress's intent could not have been clearer. That section was titled "Development of Competition and Diversity in Video Programming Distribution."[7] Among its express purposes, as stated in Section 628(a), was "to increase[e] competition and diversity in the multichannel video programming market. . .."

Consistent with that broad pro-competitive goal, Congress (in Section 628(c)(2)(C) of the Act) directed the FCC to:

> prohibit practices, understandings, arrangements, and activities, including exclusive contracts for

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5 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

6 47 U.S.C. §521(6). As would be expected of companies whose monopoly position was threatened, the cable industry fought vigorously against the 1992 Cable Act, engaging in "furious lobbying" to prevent the advent of competition into the MVPD market. *See* The 1992 Cable Act, Law & Legislative History 4 (Robert E. Emeritz et al. ed., Pike & Fischer, Inc. 1992).

7 47 U.S.C. §548.

> satellite cable programming [[8]]… between a cable operator and a satellite cable programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest ….[9]

That prohibition reflected Congress's recognition that many of the most popular cable programming services were vertically integrated with the major cable TV operators, and that such vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators

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[8] 47 U.S.C. §548(a). "Satellite cable programming" is defined in Section 628(i)(1) by reference to Section 705 of the Communications Act, which defines the term as "video programming which is transmitted via satellite and which is primarily intended for direct reception by cable operators for their retransmission to cable subscribers." *See* 47 U.S.C. §605(d)(1). "Satellite cable programming" thus refers to programming distributed by programmers to cable operators, rather than directly to the public, and refers only to programming distributed to operators by satellite, as opposed to other media of distribution. The reference to distribution to operators by the medium of satellite recognizes that at the time of enactment, the primary medium used by programmers to distribute programming to cable operators was satellite. Today, in addition to distribution by satellite, an increasing amount of programming is distributed to cable operators by fiber optic lines.

[9] 47 U.S.C. §548(c)(2)(C).

over competitors to those cable operators. Obviously, such conduct would deter, if not destroy, those competitors.[10]

Congress initially provided that the exclusive contract prohibition would expire 10 years after enactment of the 1992 Cable Act (*i.e.*, on October 5, 2002). But clearly recognizing that elimination of the prohibition at that point might turn out to be premature, Congress expressly authorized the FCC, at the end of the initial 10-year prohibition period, to review whether the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[11] If the

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[10] *See* Section 2(a)(5) of the 1992 Cable Act. *See, also,* 138 CONG. REC. H6487, H6539 (statement of Rep. Lancaster) ("New technologies . . . are ready to compete with cable.... But the cable industry has done everything in its power to keep these competitors from getting off the ground. Cable programmers, who also own local cable companies, have denied competing technologies access to their programming–either by refusing to sell or by charging ridiculously high prices."); 138 CONG. REC. H6487, H6540 (statement of Rep. Eckart) ("they [the cable industry] know that if they maintain their stranglehold on this programming, they can shut down competition - - even the deep pockets of the telephone companies for a decade or more."); 138 CONG. REC. H6487, H6541 (statement of Rep. Harris) ("[W]ithout access to quality and diverse programs, these [new] technologies may never get off the ground. Vertically integrated cable companies have the ability to choke off these potential competitors by keeping a stranglehold over programming."). The FCC was certainly aware of the legislative history of the 1992 Cable Act in the FCC ruling currently under review by this Court. *See 2007 Order* at paragraph 3 (JA ___).

[11] 47 U.S.C. § 548(c)(5).

FCC concluded that the prohibition was still necessary, the FCC was authorized to extend it.

As directed by Congress, the FCC imposed the exclusive contracts prohibition in 1993.[12] And at the end of the preliminary ten-year period, the FCC compiled a further record on the basis of which it concluded that a five-year extension of the prohibition was warranted. That conclusion was based on extensively documented findings that competition and diversity in the distribution of video programming would be impaired without the prohibition.[13] The FCC particularly noted that certain vertically integrated cable programming services are both unique and so popular that competitors "must-have" access to such services or their ability to attract and retain subscribers would be jeopardized.[14] Furthermore, while the FCC recognized the growth of satellite operators such as DirecTV and EchoStar as competitors to the incumbent cable TV operators, it noted with particular

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[12] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359 (1993) ("*First Report and Order*"); *recon.*, 10 FCC Rcd 1902 (1994); *further recon.*, 10 FCC Rcd 3105 (1994).

[13] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, 12139, 12147-50 (2002) ("*2002 Extension Order*").

[14] *Id*. at paragraph 33.

concern that significant competition from wireline competitors (such as BSPA's members) had yet to develop.[15] Accordingly, the FCC concluded that the competitive goal of the 1992 Cable Act had still not been fully achieved, and the FCC extended the prohibition.

Neither the incumbent cable operators nor their affiliated programming services appealed the *2002 Extension Order*.

The FCC again considered the status of competition in the MVPD market in the *2007 Order* under review here. The FCC extensively analyzed the record against the backdrop of its extensive administrative expertise developed through decades of regulating the MVPD industry. The FCC found that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. Accordingly, the FCC retained the prohibition for an additional five years.[16] The FCC concluded that:

> there are no close substitutes for some satellite-delivered vertically integrated programming and that such programming is necessary for viable competition in the video distribution market. Having made this determination, we further conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs such that

[15] *Id*. at paragraphs 46 and 65.

[16] *See, e.g., 2007 Order* at paragraph 1 (JA ___).

> competition and diversity in the distribution of video programming would not be preserved and protected.[17]

Addressing the question of "must-have" programming, the FCC noted that cable programming (including news, drama, sports, music or children's programming) is "not akin to so many widgets"; rather, particular programs can and do constitute separate, unique, attractions for which no other programs would be deemed an adequate substitute by fans. (The FCC cited HBO's *The Sopranos* as an example.)[18]

In the *2007 Order* the FCC also found that vertically integrated cable programmers continued to have a strong economic incentive to withhold programming from new entrants (such as BSPA's members).[19] This is because new entrants by definition begin with no subscribers and may have a limited subscriber base during multiple years of construction and establishing a sustainable economic market position. Under these circumstances, the lost revenues that a vertically integrated programmer

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17 *Id.* at paragraph 42 (JA ___).

18 *Id.* at paragraph 38 (JA ___). *See also id.* at note 180, noting comments of BSPA member RCN Telecom Services Inc. that vertically integrated movie video-on-demand services are must-have programming, as "there is only one Gone With the Wind."

19 *Id.* at paragraphs 29, 41 and 60 (JA ___).

would incur from withholding programming would be “negligible,” and far out-weighed by the benefit of potentially eliminating a competitor.[20]

Thus, the FCC’s action below is unquestionably consistent with the clear direction of Congress to promote competition in the MVPD industry. By giving the FCC authority to extend the exclusive contract prohibition, Congress recognized that the development of competition in the industry might take longer and require more governmental involvement than might have been predicted on the basis of the 1992 record – at which time true competition was still more wish than fact. Seeking to advance the Congressionally-identified goal of promoting competition, the FCC has simply complied with its statutory mandate.

II. Broadband Service Providers Play an Important Role in Promoting Federal Policies in Favor of Competition in Multichannel Video Services.

In the last 12 years, BSPs have established a unique position in the multichannel video programming distribution market. They are neither the giant nationwide incumbent cable TV operators such as Comcast or Time Warner, nor the giant nationwide incumbent telephone companies such as Verizon or AT&T. Nevertheless, as smaller, local or regional providers of state-of-the-art services in many urban, suburban and rural areas throughout

[20] *Id.* at paragraph 60.

the country, BSPA's members are prime examples of the new competitors envisioned and sought by Federal policy-makers. These companies have emerged as industry leaders and innovators, offering significant new price and service options to consumers for multichannel video services, as well as for voice, and Internet services. Their model (both technological and commercial) of successfully offering these services bundled together has become a template for service and network expansion being pursued by incumbent cable TV operators and incumbent telephone companies.

BSPA's members are precisely the sort of competitors who were the intended beneficiaries of the pro-competition provisions of Section 628. For 12 years they have been on the "front line" of the competitive battle against incumbent cable TV operators. They have been the target of various strategies used by incumbent cable TV operators in an effort to preserve their dominant market positions, including the strategy of denying competitors access to vertically integrated programming services. For example, BSPA member RCN Telecom Services, Inc. was the victim of attempts by an incumbent cable TV operator to deny access to vertically integrated regional sports network ("RSN") programming in New York City and Philadelphia that the FCC pointed to in the *2007 Order* as evidence that the incumbent cable operators still retain the incentive to deny such programming to competitors when regulations do not prevent those anti-competitive strategies.[21]

While the MVPD world is populated to a significant degree by giant corporations with vast resources immediately available to them, BSPA's members are different. Unlike Intervenors Verizon and AT&T (and most assuredly unlike the Petitioners here), BSPA's members are relatively ***small*** companies.[22] As a result, BSPA members are *even more* vulnerable to anti-competitive withholding of vertically integrated programming services than are their larger competitors. Unlike incumbent cable TV operators or large

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[21] *2007 Order* at paragraph 49 (JA ___). As discussed more fully therein and in related FCC proceedings, the incumbent cable operator in Philadelphia refused to make a regional sports network available to RCN, and in New York City RCN was deprived of access to overflow sports programming from the incumbent cable operator. In both of these cases, the programming at issue was not delivered by satellite, and thus not subject to the Section 628 exclusive programming prohibition. The FCC found that these examples were significant because they clearly demonstrated that absent a prohibition, vertically integrated programmers retain an incentive to withhold programming from competing MVPDs. *Id.* at paragraph 51.

[22] To say that BSPs are relatively small is a considerable understatement. By way of illustration, the assets of *all* of BSPA's members, when added together, constitute ***less than 1%*** of the total assets of AT&T standing alone, and barely more than 1% of Verizon's total assets. *See*, 2007 Annual Reports available at http://www.att.com/gen/landing-pages?pid=5718, http://www.investor.verizon.com, and compare with those available at http://www.investor.rcn.com, http://www.knology.com, and http://www.SureWest.com. BSPA Member Hiawatha Broadband is privately held and does not provide public financial statements. However, Hiawatha Broadband is significantly smaller than the other BSPA members.

incumbent telephone companies, BSPs face established and robust competition for all of their services in every market where they operate. They do not have any established business and related financial resources in less competitive markets that can be used as financial leverage for new business development or to sustain losses incurred in generating start-up operations. The investment capabilities of BSPs are fully absorbed in network expansion and upgrades to create the primary MVPD competition they bring to the markets they serve. BSPs thus do not have the internal scale or financial resources to consider any major investments in programming.

But, with access to programming available to them as a result of the exclusive contract prohibition, competitors such as BSPA's members have survived and become models for the type of wireline competition desired by federal regulators. As a direct result of such competitors, consumers have benefited from not only from better services, but from lower prices. The decision below reflects the salutary influence of competitors such as BSPA's members. Incumbent cable operators have for years continued to raise prices in excess of inflation. *See 2007 Order* at paragraph 50 and note 268, *citing Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average*

Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15088 at paragraph 2 (2006) ("*2006 Cable Price Report*"). But, as noted in that very same paragraph of the *2006 Cable Price Report*, cable prices were on average 17 percent ***lower*** where wireline multichannel competitors (such as BSPs) have been present. BSPs have been, and should continue to be, a major provider of that wireline multichannel competition, especially in rural and suburban areas.[23] However, in order for consumers to continue to benefit from such competition, competitors need to have continued access to certain must-have programming services. The FCC below correctly found that to be the case, and no basis exists for reversal of that decision.

III. Petitioners' Arguments Ignore the Critical Importance of the Exclusive Contract Prohibition in Markets Where Smaller Competitors Operate.

As demonstrated in Respondents' brief, the Petitioners' arguments are fatally flawed in virtually all respects. But BSPA is particularly concerned that, sprinkled through Petitioners' brief are suggestions that, if left unchallenged, might lead the Court to believe that the competitive factors at work are something other than they really are. In particular, Petitioners

[23] BSPA's members alone serve over 50 communities with populations of less than 50,000. Numerous small rural telephone companies throughout the country provide competitive MVPD service to rural communities.

seem to assume that the new entrants seeking to compete with the incumbent cable operators are all huge companies with endless financial resources. That assumption is unequivocally wrong with respect to BSPA's members. To the extent that Petitioners' arguments are based on that faulty assumption, those arguments are also unequivocally wrong. Petitioners have completely and improperly ignored the critical importance of the exclusive programming prohibition in maintaining competition in markets where smaller competitors operate.

A. Smaller Competitors Do Not Have the Level of Sunk Investments That Would Justify Continuing to Operate at a Substantial Competitive Disadvantage Without Access to "Must-Have" Programming.

Petitioners' assert that the elimination or narrowing of the program access exclusivity rule would not harm competition because competitors allegedly have "massive sunk costs, [and thus] it is implausible that competitors would be forced to exit." Petitioners' Brief at page 26.[24] While Amicus does not believe that that facile assumption is valid relative to large competitors such as AT&T or Verizon, BSPA knows for sure that that assumption is ***not*** valid as applied to smaller competitors such as BSPs.

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[24] *See also* Petitioners' Brief at page 66, asserting that "where there are entrenched competitors who have sunk investments and are therefore unlikely to exit, withholding [programming] is unlikely to cause consumers harm."

Of course, Petitioners point to no evidence in the record below, and provide no other evidence in their Brief, to substantiate the assertion that any new entrants have invested so much money in their multichannel video business that they could not rationally exit that business. Their argument is nothing more than unsupported speculation which the Court can and should properly disregard.

Petitioners' argument clearly ignores the situation of smaller new entrants such as BSPs. While these companies have made significant investments in their multichannel video businesses, the size of such investments pales in comparison with those of the incumbent cable TV operators or of large new entrants such as DirecTV, Verizon and AT&T. For example, Petitioners note that "Verizon has committed itself to invest $18 billion in upgrading its network to provide video service, while AT&T committed to spend $5 billion." Brief at page 12. Apparently, Petitioners believe that such substantial investments would prevent a competitor from withdrawing from the market.

Petitioners again have no actual basis for that claim – but even if they did, it would be immaterial insofar as BSPA's members are concerned. The ***total assets*** of *all* of BSPA's members are far below the level of investments described by Petitioners.[25] No company the size of a BSPA member has anywhere near the level of sunk investment in the MVPD business to come within the scope of Petitioners' claims (even if those claims were deemed, *arguendo*, valid and supported). Moreover, no such smaller company could rationally ignore the risk of significant financial losses that would likely occur if they were denied access to the must-have programming necessary to stay competitive. And no such company could rationally incur on-going cash flow losses and continue to operate regardless of those losses.[26] BSPs are vulnerable in each market they serve until they have established a business of sufficient scale to financially sustain those operations. The basic construction process for a new network takes from 3 to 6 years. The denial to new entrants of access to must-have programming

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[25] *See* Note 22 *supra.*

[26] Indeed, even the giants of the industry, with huge sunk investments, have been placed in positions where they must choose to exit the MVPD business, in spite of the fact that doing so would come at a great financial loss. For example, after investing approximately $100 billion in the purchase of cable TV operators TCI and Media One in the late 1990's, AT&T shortly thereafter exited the MVPD business, selling the vast majority of its cable TV systems to Comcast in 2002 for approximately $29.2 billion in stock and assumption of $24 billion in debt. *See Deconstructing AT&T,* CFO Magazine, July 2002; and *Done Deal: Comcast's AT&T Acquisition Becomes Official,* CableFax, Vol. 13, No. 224, November 19, 2002. Ultimately, AT&T subsequently re-entered the MVPD business, but that does not negate the fact that the company sold its systems when necessary due to financial constraints.

would significantly diminish the probability of those new entrants reaching the critical mass of customers needed to sustain the business. Indeed, it has been the repeated experience of BSPA's members that assured access to must-have content has been essential to their ability to raise the capital needed to enter the MVPD business.[27]

In sum, smaller competitors such as BSPA's members do not have and could not have the level of sunk investments that would justify the continuation of operation at a substantial competitive disadvantage without access to "must-have" programming. Rather, in the absence of access to such programming, smaller competitors will be more likely not to enter a new market or to exit an established market where they face sustained losses, a result that is inconsistent with Section 628's goal of promoting competition in that market.

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[27] It should be noted that all of the current competitors (both satellite and wireline) to incumbent cable TV operators have developed after and benefited from the enactment of Section 628's prohibition on exclusive contracts for satellite delivered programming. The potential anti-competitive impact of denial of access to satellite delivered content has thus never been experienced by competing MVPDs. However, the fact that this anti-competitive impact may not yet have been experienced is immaterial. The FCC is authorized, and expected, pursuant to Section 628 and relevant court precedent, to exercise its expertise in making predictive judgments regarding this issue. The FCC did so below, in a fully reasoned and well-explained manner.

B. Smaller Competitors Do Not Have the Financial Resources to Produce or Obtain Their Own Programming That Might Substitute for Current "Must-Have" Programming.

Petitioners' Brief suggests that competition will not suffer if the exclusive contracts prohibition is eliminated, because competitors to the incumbent cable operators could purchase or produce their own programming as substitutes for "must-have" vertically integrated cable programming. For example, Petitioners claim that "Verizon and AT&T are giant firms that dwarf the cable operators with which they compete and could easily invest in programming of their own…." Petitioners' Brief at page 19. However, the critical issue is not whether competing MVPDs can invest in their own programming of ***any*** sort, but whether they can obtain the "must-have" programming that any MVPD needs in order to stay competitive. In light of their relatively limited financial resources, it is certainly the case that competitors such as BSPA members could ***not*** do so.[28]

In the *2007 Order* the FCC found, after extensive analysis, that currently certain unique programming services are so popular that they have no substitutes in the market; accordingly, access to such programming is

[28] Furthermore, Amicus does not believe that even large companies such as AT&T or Verizon could easily use their greater resources to create programming that would substitute for existing "must-have" programming, or to purchase the providers of "must-have" programming.

necessary for competition in the video distribution market to remain viable. *See 2007 Order* at paragraphs 38-39. The FCC considered – and conclusively rejected – the argument that the financial resources of competing telephone company MVPDs should undercut the need for the exclusive contract prohibition. According to the FCC,

> [t]he competitors to which the cable operators refer are new entrants to the video distribution market, and have no established customer base. If cable operators have exclusive access to content that is essential for viable competition and for which there are no close substitutes, and they have the incentive to withhold such content, they can significantly impede the ability of new entrants to compete effectively in the marketplace, ***regardless of their level of resources***.[29]

In other words, even the most well-heeled competitors cannot overcome the competitive disadvantage imposed by an inability to obtain essential, unique, "must-have" programming.

Petitioners do not challenge the FCC's finding that certain unique, exceptionally popular programming services have no adequate substitutes in the market. Rather, Petitioners merely half-heartedly recite the argument (rejected in the *2007 Order*) that competing telephone company MVPDs should just go out and purchase their own programming with their own vast resources. Even if the argument were valid as applied to large companies

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29 *2007 Order* at paragraph 41 (emphasis added) (JA ___).

like AT&T and Verizon (and Amicus does not concede that point), it certainly is ***not*** valid as applied to small companies like BSPA members, who absolutely do not have the resources to go out and purchase or produce "must-have" programming or competitive substitutes for such programming. Even assuming that such substitute programming were in fact available (and Amicus does not concede that point), no BSP has the resources to go into the market and purchase enough such programming to fill up a schedule 24 hours per day, seven days per week, as a substitute for a single must-have channel such as TNT. Even more so, BSPs do not have the resources to purchase such programming to substitute for the <u>multiple</u> "must-have" channels that are vertically integrated with incumbent cable operators. Similarly, no BSPA member has the resources required to purchase ownership of an existing "must-have" programming service such as TNT or HBO.

Again, Petitioners have advanced an argument that ignores the reality of the marketplace. As the FCC correctly concluded, the reality is that competition will be enhanced by the extension of the exclusive contract prohibition, and it will be diminished if that prohibition is abandoned. In light of Congress's unmistakable mandate to promote competition, the Petitioners' fanciful challenge is unavailing.

C. Smaller Competitors, Such as BSPs, Do Not Have the Financial Resources to Continuously Litigate for Access to Programming.

Petitioners argue (Brief at page 62) that if the program access rule were allowed to sunset, "even if … there were any small harm to competition, there are other, less burdensome measures to deal with it." By "other less burdensome measures," Petitioners appear to refer to the ability of MVPD competitors to seek redress through litigation – by filing program access complaints based on discrimination under Section 628(c)(2)(B) of the Communications Act [30], or possibly by seeking antitrust relief. In essence, Petitioners offer this *case-by-case litigation* remedy as a reason why the *structural/regulatory prohibition* on exclusive contracts for vertically-integrated satellite cable programming in Section 628(c)(2)(C) of the Communications Act should be allowed to sunset. Petitioners' argument is fatally flawed.

With respect to Petitioners' suggestion that non-integrated MVPDs could protect themselves through the complaint process at the FCC, the FCC below carefully analyzed and thoroughly, and correctly, rejected it. As the Commission observed, the notion that aggrieved competitive MVPD

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[30] Section 628(c)(2)(B) prohibits improper discrimination in setting the prices, terms and conditions of the sale of vertically-integrated satellite cable programming. 47 U.S.C. § 548(c)(2)(B).

operators should bear the burden of demonstrating that the public interest is not being served would be flatly inconsistent with Congress's intentions.[31] Moreover, since Congress imposed the exclusivity prohibition after the complaint process was already in place, it is clear that Congress did not view the complaint process as an adequate mechanism for avoiding potential bars to competition.[32] Petitioners provide no basis for questioning the correctness of the FCC's analysis on these points.

In addition, the FCC was also well aware of the issue of the high cost to competitors to file a program access complaint in order to remedy anti-competitive behavior by vertically-integrated satellite cable programming providers. In the Notice of Proposed Rulemaking that led up to the *2007 Order*, the FCC sought comments on "the costs associated with the complaint process.…"[33] The record in the proceeding below shows that the

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[31] *2007 Order* at note 320 ("Section 628(c)(2)(D) places the burden on the party seeking exclusivity to show that an exclusive contract meets the statutory public interest standard and that no other program access provision provides this protection.") (JA ___).

[32] *2007 Order* at note 320 (JA ___).

[33] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 (2007). (JA ____)

cost of litigating complaints relative to Section 628 violations is a significant barrier to smaller competitors. Indeed, the *2007 Order* acknowledged the comments of small and rural telephone company associations that "the current process is so costly and time-consuming that it is impracticable for rural carriers to pursue a program access complaint."[34]

Petitioners' Brief may alternatively be read to suggest that litigation under the antitrust laws would be an adequate substitute for the exclusivity prohibition. Again, though, the *2007 Order* properly rejected that alternative as well. The FCC found that reliance on anti-trust litigation as a remedy was not only inconsistent with the mandated prohibition on vertically-integrated exclusive contracts set forth in Section 628(c)(2)(D), but inconsistent as well with "the legislative history of the 1992 Cable Act [which] reflects Congress's concern regarding the 'prohibitive cost of pursuing an antitrust suit.'"[35] Petitioners' brief provides no significant discussion as to why the

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34 *2007 Order* at paragraph 85, citing the Joint Comments of the Organization for the Protection and Advancement of Small Telephone Companies/ Independent Telephone and Telecommunications Alliance ("OPASTCO/ITTA") (JA ___). *See also 2007 Order* at paragraph 104 (JA ___). At paragraph 105 of the *2007 Order*, the FCC also acknowledges the comments of Coalition for Competitive Access to Content ("CA2C") noting that non-integrated operators are forced "to divert inordinate resources to prosecution of program access complaints." (JA ___)

35 *2007 Order* at paragraph 62 (JA ___), *citing* S.Rep. No. 102-92, at 29 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1122, 1162.

FCC's finding should be overturned. In any case, Petitioners' argument is fatally flawed because it ignores the fact that smaller competitors, such as BSPA's members, do not have the financial resources to continuously participate in anti-trust litigation.

This Court and the Supreme Court have specifically endorsed the principle that due to burdensome costs, piecemeal litigation is an inadequate substitute for structural regulatory prohibitions in preventing anti-competitive behavior of cable operators. For example, in upholding the validity of another provision of the 1992 Cable Act which required the FCC to prescribe a specific numeric nation-wide cap on the number of subscribers that a particular cable operator may serve, this Court affirmed the use of "structural limitations", as opposed to "individual proceedings", to achieve the desired regulatory goal:

> [n]or is it a fatal flaw that the subscriber limits provision focuses upon behavior already arguably proscribed by other laws. In the subscriber limits provision the Congress took a structural approach to the regulation of cable operators, whereas the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions. As a structural limitation, the subscriber limits provision adds a prophylaxis to the law *and avoids the burden of individual proceedings to remedy particular instances of anticompetitive behavior.*[36]

[36] *Time Warner Entertainment Co., L.P. v. United States*, 211 F.3d 1313, 1320 (D.C. Cir. 2000), *cert. den'd*, 531 U.S. 1183 (2001) (emphasis added).

Similarly, in upholding yet another provision of the 1992 Cable Act designed to remedy the anti-competitive refusal of cable operators to carry local TV stations on their cable systems, the Supreme Court dismissed the petitioner's suggestion that antitrust enforcement is an adequate alternative to a statutory/regulatory mandatory carriage obligation, stating:

> Congress could conclude ... that the considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these remedies inadequate substitutes.[37]

The same reasoning applies in the present case: because the financial burden of complex litigation regarding anti-competitive behavior would fall much more heavily on the small competitor complainant than on the larger incumbent cable operator defendant, pursuing anti-trust litigation on an on-going basis would be *particularly* burdensome for smaller competitors such as BSPA’s members.

In sum, the FCC’s determination that piecemeal litigation is not an valid or adequate substitute for the structural prophylaxis chosen by

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[37] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 222-23 (1997)

Congress was correct, consistent with relevant judicial decisions, and not seriously challenged by Petitioners here.

Conclusion

For the foregoing reasons, the Court should deny the petitions for review, and affirm the FCC's order below.

Respectfully submitted,

/s/ Harry F. Cole
Harry F. Cole
Paul J. Feldman
FLETCHER, HEALD & HILDRETH, PLC
1300 NORTH 17TH STREET - 11TH FLOOR
ARLINGTON, VA 22209
703.812.0400

Counsel for Amicus Curiae Broadband Service Providers Association

August 20, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), Cir. R. 32(a)(2), and this Court's order of May 20, 2008, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 6,337 words. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word 2003) used to prepare this Brief.

/s/Harry F. Cole
Harry F. Cole

August 20, 2008

CERTIFICATE OF SERVICE

I certify that, on this 20th day of August, 2008, I caused copies of the foregoing *Brief of Amicus Curiae* to be served by first-class mail upon the following parties:

Nancy C. Garrison
Catherine G. O'Sullivan
U.S. Department of Justice-Main Bldg.
Antitrust Division
950 Pennsylvania Avenue, NW, Room 3224
Washington, DC 20530

Nandan M. Joshi
Daniel M. Armstrong
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Lynn R. Charytan
Jack N. Goodman
Dileep S. Srihari
Wilmer, Cutler, Pickering, Hale & Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006-1420

Helgi C. Walker
Eve Klindera Reed
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

Michael E. Glover
Edward H. Shakin
William H. Johnson
Verizon
1515 North Courthouse Road, Suite 500
Arlington, VA 20036-5694

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1401 I Street, NW, 4th Floor
Washington, DC 20005

David P. Murray
Ryan Wallach
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006

Henk Brands
Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1615 L Street, NW, Suite 1300
Washington, DC 20036

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004

Pantelis Michalopoulos
Steptoe & Johnson, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036

/s/Paul J. Feldman
Paul J. Feldman