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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-326

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: December 15, 1994 Released: December 23, 1994

By the Commission: Chairman Hundt not participating.

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I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider a petition for

reconsideration of our *First Report and Order*[1] and the rule implementing Section 628(c)(2)(C) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] filed by the National Rural Telecommunications Cooperative ("NRTC").

2. The 1992 Cable Act amended the Communications Act of 1934, in part, by adding a new Section 628. Section 628 is intended to foster the development of competition to traditional cable systems by providing greater access by competing multichannel systems to cable programming services. Specifically, Section 628(b) states that:

> it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[3]

3. Section 628(c) directs the Commission to adopt regulations that specify particular conduct that is prohibited by Section 628(b). At a minimum, the regulations must:

> (A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;
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> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from---
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> (i) imposing reasonable requirements for creditworthiness, offering of

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[1] *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, Report and Order*, 8 FCC Rcd 3359 (1993) (*"First Report & Order"*).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 47 U.S.C. § 548(b).

service, and financial stability and standards regarding character and technical quality;

(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

(iv) entering into an exclusive contract that is permitted under subparagraph (D);

(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast 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 or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.[4]

4. Pursuant to that mandate, the Commission adopted its *First Report and Order*, which set forth the program access rules and procedures to implement those statutory provisions. With respect to the specific prohibition contained in Section 628(c)(2)(C), the Commission adopted Section 76.1002(c)(1), which states:

No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable

[4] 47 U.S.C. § 548(c)(2).

programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.[5]

5. NRTC filed a petition for reconsideration of the *First Report & Order*, requesting that the Commission amend Section 76.1002(c)(1) to include within its prohibition for areas unserved by cable, exclusive contracts for the distribution of programming between direct broadcast satellite ("DBS") distributors and vertically integrated satellite cable programming vendors. United States Satellite Broadcasting, Inc. ("USSB"), Time Warner Entertainment Company, L.P. ("Time Warner"), Viacom International, Inc. ("Viacom"), Discovery Communications, Inc. ("Discovery"), and Liberty Media Corporation ("Liberty Media") opposed this petition. NRTC and DirecTV, Inc. ("DirecTV") filed replies. After the close of the pleading cycle, NRTC,[6] USSB, DirecTV, Viacom and Home Box Office, Inc. ("HBO") filed *ex parte* pleadings.[7]

6. For the reasons discussed below, we deny NRTC's petition and decline to amend Section 76.1002(c)(1). We conclude that our current interpretation of Section 628(c)(2)(C) is the most reasonable one.

II. BACKGROUND

7. The 1992 Cable Act and its legislative history indicate that Congress was concerned with expanding the availability of programming and eliminating unjustified discrimination in the price charged to non-cable technologies.[8] Congress noted that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable

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[5] 47 C.F.R. § 76.1002(c)(1).

[6] In addition, more than one hundred members and affiliates of NRTC submitted letters in support of NRTC's comments.

[7] NRTC, USSB, DirecTV, Viacom and HBO made the same arguments in their comments and reply comments to the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, CS Docket 94-48, 9 FCC Rcd 2896 (1994).

[8] 1992 Cable Act, §§ 2, 19, Communications Act § 628, 47 U.S.C. § 548; House Comm. on Energy and Commerce, H.R. Rep. No. 102-862, ("Conference Report") 102d Cong., 2d Sess. at 93 (1992); Senate Comm. on Commerce, Science and Transportation, S. Conf. Rep. No. 102-92, ("Senate Report"), 102d Cong., 1st Sess. at 23-29 (1991); House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, ("House Report") 102d Cong., 2d Sess. at 165-68 (1992); 138 Cong. Rec. H6487-6571 (daily ed. July 23, 1992).

operators over other multichannel video programming distributors ("MVPDs").[9] Thus, Congress concluded that program access provisions targeted at breaking the "stranglehold" over programming created by those vertical relationships in the cable industry would lead to a more balanced competitive environment in the multichannel video programming marketplace.[10] Direct broadcast satellites were among the technologies that were to be fostered through the program access provisions of the 1992 Cable Act.[11]

8. As background on the DBS industry, the first DBS satellite ("DBS-1") was launched in December 1993; it is co-owned and jointly operated by Hughes Communications Galaxy, Inc., (whose affiliated company, DirecTV, is the DBS provider) and USSB, which is owned by Hubbard Broadcasting, Inc.[12] The satellite is situated at the 101° West Longitude orbital position.[13] DirecTV owns eleven of the sixteen transponders on DBS-1 and USSB owns the remaining five.[14] On June 17, 1994, DirecTV and USSB began providing DBS service. Currently, DirecTV offers 150 channels and USSB offers 20 channels.[15] As of June 17, 1994, DBS service was available throughout the entire continental United States.[16] At present, DirecTV and USSB are the only entities offering high-power Ku-band (small dish) DBS service in the United States, although several other parties hold construction permits for

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[9] 1992 Cable Act, § 2(a)(5).

[10] *See* 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(statement of Rep. Eckart in support of the Tauzin amendment).

[11] House Report at 165-66 (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

[12] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* in CS Docket 94-48, (*"First Competition Report"*), FCC 94-235, released September 28, 1994, at ¶63; *Ex Parte* Reply of USSB ("USSB Second *Ex Parte*"), filed September 2, 1994 at n.1; DirecTV Reply, Attachment A at 7.

[13] *United States Satellite Broadcasting Company, Inc. and Hughes Communications Galaxy, Inc.*, 7 FCC Rcd 7247, 7251 (1992).

[14] *Id.*

[15] *First Competition Report* at ¶ 63. Both DirecTV and USSB represent that with signal compression and improvements in encoder equipment, as well as the August 3, 1994 launch of DirecTV's DBS-2, soon each will be offering more channels. *Id.* at ¶¶ 63-64.

[16] USSB Second *Ex Parte* at 1 n. 1.

other orbital locations.[17]

9. NRTC is a non-profit corporation, owned and controlled by over 500 rural electric cooperatives and over 200 rural telephone systems throughout 49 states.[18] NRTC assists its member companies in meeting telecommunications needs of rural consumers, through the marketing of "C-band" (low power, large dish) satellite delivered video programming.[19] NRTC entered into a DBS distribution agreement with DirecTV that grants NRTC exclusive rights to market DirecTV programming to rural subscribers.[20] The agreement also requires DirecTV to obtain certain programming on behalf of NRTC.[21]

10. USSB entered into exclusive distribution agreements with Viacom and Time Warner to carry HBO and Showtime, respectively. Both Viacom and Time Warner are vertically integrated satellite cable programming vendors. USSB's agreements with HBO and Viacom give USSB exclusive rights to the programming only with respect to DBS distributors at the 101° West Longitude orbital location.[22] The agreements do not restrict access to the programming by multichannel multipoint distribution services ("MMDS"), satellite master antenna television ("SMATV"), or C-band satellite distributors, and the

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[17] *See Continental Satellite Corporation*, 4 FCC Rcd 6292, 6300-01 (1989)(granting eight construction permits, including USSB and Hughes); *Tempo Satellite, Inc.*, 7 FCC Rcd 2728, 2732 (1992). *See also,* Assignments of orbital positions: *Echostar Satellite Corporation*, 7 FCC Rcd 1765, 1770 (1992); *Advanced Communications Corporation*, 6 FCC Rcd 2269, 2272, 2274 (1991); *Directsat Corporation*, 8 FCC Rcd 7962, 7964 (1993); *Direct Broadcast Satellite Corporation*, 8 FCC Rcd 7959, 7961 (1993).

[18] NRTC Petition for Reconsideration ("Petition"), filed June 10, 1993, at 2.

[19] *Id.* at 2-3.

[20] *Id.* at 3.

[21] NRTC First *Ex Parte* Presentation ("NRTC First *Ex Parte*"), filed November 19, 1993, at 2.

[22] The DBS-1 satellite at the 101° West Longitude location can deliver a signal to the entire continental United States ("full-CONUS"). Under international treaties and agreements, the United States is assigned eight orbital locations for high-power DBS satellites. These eight orbital locations are divided between eastern locations which provide signals to the eastern half of the continental United States ("half-CONUS") and western locations which provide signals to the western half-CONUS. Three of the four eastern orbital locations (101° West Longitude, 110° West Longitude, and 119° West Longitude) can also deliver a full-CONUS signal. The fourth eastern orbital location, 61.5° West Longitude, may not be able to deliver an adequate full-CONUS signal.

agreements do not restrict access by any DBS distributor at any other orbital location.[23]

III. SUMMARY OF PLEADINGS

11. NRTC contends that the Commission incorrectly interpreted Section 628(c)(2)(C) by promulgating a rule that limits the *per se* prohibition against exclusive arrangements in areas unserved by cable operators to those exclusive agreements between cable operators and vertically integrated satellite cable programming vendors (and satellite broadcast programming vendors).[24] NRTC argues that Congress did not intend to limit Section 628(c)(2)(C) only to exclusive agreements with cable operators but rather to exclusive agreements with any MVPD. NRTC states that by limiting the reach of the Section to cable operators, the Commission's rule thwarts the purposes of Section 628 to increase competition, diversity and availability of programming to persons in rural and other currently unserved areas.[25] NRTC states that Congress intended to cover any activity of vertically integrated satellite cable programming vendors (including cable operators), as well as satellite broadcast programming vendors, that prevents an MVPD from obtaining programming in areas unserved by cable. NRTC petitions the Commission to amend Section 76.1002(c)(1) to reflect a *per se* prohibition on any practices, understandings, arrangements and activities that involve a cable operator, satellite cable programming vendor, or satellite broadcast programming vendor that prevent an MVPD from obtaining programming from a vendor affiliated with a cable operator.

12. NRTC's request is premised upon a statutory construction of the following phrase in Section 628(c)(2)(C): "including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor." NRTC contends that the use of the word "including" by Congress was meant to enlarge, not limit, the list that precedes it.[26] Thus, under the interpretation advanced by NRTC, Section 628(c)(2)(C) would read as follows:

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[23] Home Box Office *Ex Parte* Response to *Ex Parte* Presentation of the NRTC ("HBO *Ex Parte*"), filed April 15, 1994, at 8-9; Viacom *Ex Parte* Response ("Viacom *Ex Parte*"), filed July 14, 1994, at 6 n. 5.

[24] Petition at 11.

[25] *Id.* at 11-12.

[26] Second *Ex Parte* Presentation by NRTC ("NRTC Second *Ex Parte*"), filed March 4, 1994, at 11-12 (citing *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *American Fed. of Television & Radio Artists v. NLRB*, 462 F.2d 887, 890-91 (D.C. Cir. 1972); *Exxon Corp. v. Lujan*, 730 F. Supp. 1535 (D. Wyo. 1990)).

> prohibit practices, understandings, arrangements, and activities, . . . , 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 or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section.

NRTC further contends that the legislative history shows that Congress was concerned about cable operators' control over programming in addition to the behavior of cable operators themselves.[27] NRTC also states that its interpretation is consistent with Section 628(c)(2)(D), which specifically prohibits in served areas only exclusive contracts with cable operators. In contrast, Section 628(c)(2)(C) prohibits all exclusive contracts in unserved areas.[28]

13. NRTC also argues that restricting the application of Section 628(c)(2)(C) to the conduct of cable operators would create a loophole in the 1992 Cable Act by allowing satellite cable programming vendors to favor certain MVPDs, and to prevent others from obtaining the programming. NRTC argues that this will result in a restriction to competition and diversity in rural markets.

14. NRTC uses the Primestar Partners, L.P. ("*Primestar*") antitrust litigation as an example of how vertically integrated programming vendors tried unsuccessfully to block the distribution of programming to potential competitors of Primestar. NRTC argues that the behavior at issue in *Primestar* currently is allowable under Section 76.1002(c)(1), because the conduct does not involve a "cable operator." Primestar is a fixed satellite service Ku-band operator owned and formed by six cable multiple system operators ("MSOs") to provide medium-power DBS service.[29] In June 1993, the U.S. Department of Justice ("DOJ") and the attorneys general ("AGs") of 40 states commenced federal antitrust actions against Primestar alleging the existence of anticompetitive restrictions on cable programming access by distributors that compete with the cable MSOs. The DOJ and AGs entered into consent decrees with the six cable MSOs.[30] The decrees restrict the ability of the MSOs to enter into

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[27] *Id.* at 14-20.

[28] *Id.* at 9-10.

[29] The six MSOs are Comcast Corporation, Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corporation, Tele-Communications, Inc., and Time Warner, Inc.

[30] *United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994) ("DOJ Final Decree"); *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993) ("AG Final Decree"). Viacom, an original investor in Primestar, entered into a separate consent decree with the AGs. *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶ 70,404 (S.D.N.Y. 1993)

exclusive contracts or to otherwise restrict the sale of programming to competitors of the cable MSOs.[31] The decrees allow Primestar to deal only with one high-power DBS provider at the 101° West Longitude orbital location, and further provide that any agreements made with high-power DBS providers at any other orbital location be made on terms that are as favorable as those agreed to with the first DBS provider at the 101° West Longitude location.[32]

15. Finally, NRTC contends that, because of USSB's exclusive contracts for HBO and Showtime, NRTC has been precluded from obtaining these programming services. NRTC also contends that USSB's arrangement for HBO and Showtime sets a baseline price for that programming, below which no DBS provider can obtain such programming.[33]

16. DirecTV supports NRTC's petition, but contends that the Commission should confine its reconsideration to the proper scope of Section 628(c)(2)(C). DirecTV agrees with NRTC's position that the plain language of Section 628(c)(2)(C) supports a broader interpretation than that contained in Section 76.1002(c)(1).[34] In addition, DirecTV argues

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("Viacom Final Decree").

[31] The DOJ Final Decree prohibits for a period of five years the enforcement of existing or future exclusive programming contracts between programming services controlled by the MSOs and cable systems controlled by the MSOs. Under this decree, the MSOs cannot restrict or limit the sale of cable programming to DBS providers and other non-affiliated cable operators. In addition, the MSOs cannot engage in retaliatory conduct against programmers who sell programming to non-affiliated distributors. The AGs Final Decree prohibits enforcement of any existing contracts that restrict the sale of programming to DBS providers. Under this decree the MSO defendants may enforce existing exclusive contracts disclosed to the court, except that such agreements cannot be renewed nor can they apply to DBS providers. Finally, the AGs Final Decree allows programming vendors controlled by the MSOs to enter into exclusive contracts with a DBS provider, subject to three conditions. First, the DBS provider cannot be controlled by owners of cable systems accounting for more than 20% of all cable subscribers; second, the exclusivity cannot preclude the availability of such programming on other orbital locations; and third, the programming vendors controlled by the MSOs shall not require as a condition for dealing that it be the exclusive distributor of the DBS provider's programming services.

[32] AGs Final Decree § IV(A)(1)(g); Viacom Final Decree § IV(A)(1)(j), (j)(iii).

[33] First *Ex Parte* Presentation by NRTC ("NRTC First *Ex Parte*"), filed November 22, 1994, at 6.

[34] *Ex Parte* Response of DirecTV ("DirecTV *Ex Parte*"), filed May 26, 1994, at 2-3. USSB requests that the Commission strike DirecTV's *ex parte* filing as an untimely petition for reconsideration. USSB argues that DirecTV's request is much broader than NRTC's

that consumers eventually will pay more for a full complement of programming by piecing together program offerings from different DBS providers rather than obtaining a complete package from one provider, and that vertically integrated programmers can thereby fragment the market and weaken DBS competitors.[35] DirecTV argues that, at a minimum, the Commission should not make any broad policy decisions regarding the propriety of exclusive contracts between non-cable MVPDs and vertically integrated programming vendors that could prevent consideration of these contracts on a case-by-case basis under other provisions of Section 628.[36] DirecTV states that USSB's exclusive contracts violate Section 628(b)'s prohibition against unfair practices and Section 628(c)(2)(B)'s prohibition against non-price discrimination, i.e., unreasonable refusals to sell.[37]

17. USSB, Viacom, Time Warner, Liberty Media, HBO and Discovery filed oppositions contending that the Commission's rule is consistent with Section 628(c)(2)(C) and the purposes underlying the 1992 Cable Act. Opponents argue that the Commission has recognized the benefits of exclusive contracts generally and that the rationale for banning exclusive contracts with cable operators does not apply to exclusive contracts with DBS providers. Opponents argue that the latter contracts are pro-competitive. Time Warner contends that the Commission should not amend its rule unless it becomes evident through the complaint process under Section 628(b) that such contracts inhibit competition. [38]

18. Opponents also argue that the only exclusive contracts required to be prohibited under the 1992 Cable Act are those to which a cable operator is a party. Several opponents argue that NRTC's interpretation of Section 628(c)(2)(C) is contrary to the legislative history, particularly the Conference Report, which states that "the regulations required . . . prohibit exclusive contracts and other arrangements between a cable operator and a vendor which prevent a multichannel video programming distributor from obtaining

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request for reconsideration because DirecTV asks the Commission to declare that all exclusive contracts between vertically integrated programmers and non-cable MVPDs presumptively are disfavored. USSB Second *Ex Parte* at 24-26. We deny USSB's request to strike because we find that DirecTV's arguments are within the scope of NRTC's reconsideration request.

[35] DirecTV *Ex Parte* at 5.

[36] DirecTV Reply at 2-4.

[37] DirecTV *Ex Parte* at 5-6, 9. Likewise, Liberty Media states that remedies already exist where "NRTC or any other multichannel video programming distributor demonstrates that a particular agreement between a vertically-integrated programmer and a non-cable distributor regarding distribution to non-cabled areas involves the exercise of market power by the cable operator affiliated with that programmer." Liberty Media Opposition at 12.

[38] Time Warner Opposition at 7-8.

programming from a satellite cable programming vendor affiliated with a cable operator."[39] Opponents state that nothing in the 1992 Cable Act or its legislative history shows Congressional intent to ban exclusive agreements between vertically integrated programming vendors and non-cable technologies, such as DBS.[40] Viacom further argues that if Congress intended to make such contracts illegal it would have plainly stated that in Section 628(c)(2)(C).[41]

19. Opponents further argue that the canons of statutory construction require the Commission to look to the overall structure of the 1992 Cable Act in interpreting Section 628(c)(2)(C).[42] USSB and Viacom argue that when read together, Sections 628(c)(2)(C) and 628(c)(2)(D) demonstrate that Congress was concerned only with exclusive contracts between cable operators and programming vendors. Thus, Congress generally prohibited such contracts except in areas served by cable operators that met the public interest determination under Section 628(c)(2)(D). Moreover, Viacom argues, the interpretation given by NRTC and DirecTV would put cable operators in a more favorable position than other MVPDs because Section 628(c)(2)(D) permits cable operators, but not other MVPDs, to enter into certain exclusive contracts.[43] USSB states that, without considering the "including" clause of Section 628(c)(2)(C), the rest of the paragraph would not make sense because the programming at issue is described in that clause.[44] USSB also argues that the Commission cannot ignore unambiguous legislative history when a literal reading of the statute results in a restriction on competition between the two DBS providers and a waste of transponder space.[45]

20. Opponents further argue that Congress was concerned with the undue market power wielded by cable operators,[46] and therefore, the entire thrust of the 1992 Cable Act

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[39] Conference Report at 92, *cited in* Discovery Opposition at 5-6; USSB *Ex Parte* Response to *Ex Parte* Presentation of NRTC ("USSB First *Ex Parte*"), filed January 24, 1994, at 23; HBO *Ex Parte* at 4; Viacom *Ex Parte* at 15.

[40] Viacom Opposition at 5; HBO *Ex Parte* at 4-5; USSB First *Ex Parte* at 15 n. 10.

[41] Viacom Opposition at 4-5.

[42] Viacom *Ex Parte* at 18 n. 18; USSB Second *Ex Parte* at 10-13.

[43] Viacom *Ex Parte* at 20-21.

[44] USSB Second *Ex Parte* at 7-10.

[45] *Id.* at 10-12.

[46] USSB Opposition at 8; Liberty Media Opposition at 11; Viacom *Ex Parte* at 6 (citing 1992 Cable Act, § 2(a)(2)).

was to foster alternatives to cable, such as DBS, by requiring that vertically integrated programming vendors sell programming to non-cable technologies.[47] Liberty Media contends that the Commission recognized that Congress directed it to avoid placing unnecessary constraints on the video programming market, and that NRTC's expansive interpretation of Section 628(c)(2)(C) would be such a constraint.[48]

21. Viacom contends that DirecTV's suggestion that exclusive contracts with distributors other than cable operators may violate Sections 628(c)(2)(B) or 628(b) would render Section 628(c)(2)(C) superfluous. Viacom states that Congress did not consider the non-discrimination provision of Section 628(c)(2)(B) nor the "unfair practices" provision of Section 628(b) adequate to ban exclusive contracts between cable operators and affiliated vendors. Thus, Viacom argues, Congress specifically provided for their ban in Section 628(c)(2)(C). Moreover, Viacom argues that, Congress specifically did not provide for the ban of non-cable exclusive contracts in Section 628(c)(2)(C).[49] USSB also argues that Sections 628(b) and 628(c)(2)(B) do not prohibit exclusive contracts that are not covered by Section 628(c)(2)(C).[50]

22. Opponents contend that the Commission previously has recognized that exclusive contracts are generally acceptable.[51] Discovery argues that exclusive contracts in the sale of programming are pro-competitive because they allow one distributor to distinguish its service from that of another, eventually leading to a diversity of programming to consumers.[52] Viacom also contends that such contracts should be judged under a "rule of reason," i.e., an examination of whether in the particular circumstance the exclusive agreement would unreasonably foreclose access to a particular product or service, and any reasonable justifications for exclusivity.[53] Liberty Media also states that the Commission has recognized exclusivity as a legitimate competitive tool, except where such arrangements

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[47] USSB Opposition at 10-11.

[48] Liberty Media Opposition at 11 (citing *First Report & Order* in MM Docket 92-266 (Rate Regulation), 8 FCC Rcd 5631, 5640, ¶ 8 (1993)).

[49] Viacom Opposition at 8; Viacom *Ex Parte* at 19-20.

[50] USSB Second *Ex Parte* at 18-20.

[51] Viacom Opposition at 9 (citing *First Report & Order*, 8 FCC Rcd at 3384, ¶ 63); USSB Opposition at 12-13; Discovery Opposition at 6; Liberty Media Opposition at 11-12.

[52] Discovery Opposition at 6.

[53] Viacom Opposition at 9 (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949); *Beltone Electronics Corp.*, 100 F.T.C. 68, 197 (1982)).

further cable operators' exercise of market power.[54] USSB points out that its exclusive agreement only applies against its direct DBS competitor at the 101° West Longitude orbital location (DirecTV), and not against any other MVPD. USSB further states that Section 628(c)(2)(C) was not intended to guarantee every MVPD access to all programming services.[55]

23. USSB argues that the rationale for prohibiting an affiliated vendor from entering into an exclusive contract with a cable operator does not apply to the same programming vendor's exclusive contracts with DBS providers. USSB states that if a cable operator, who was the exclusive distributor of a cable programming service in a particular area, did not serve an area or sell the programming service to non-cable distributors, consumers would not receive the programming from any source. In contrast, USSB explains, the existence of an exclusive contract at one orbital location does not prevent consumers in areas unserved by a cable operator from receiving the programming service from a DBS provider. Rather, states USSB, its exclusive agreement does not result in a lack of DBS service to the consumer because all consumers can receive both USSB and DirecTV programming (or the full complement of DirecTV programming and solely HBO and Showtime from USSB) through the same receive equipment and system.[56] USSB contends that DBS providers cannot exercise the type of monopolistic power exercised by cable operators over video programming distribution facilities because there are two DBS providers (USSB and DirecTV) at the 101° West Longitude orbital location. In addition, USSB argues that either USSB or DirecTV could have had *de facto* exclusivity at the 101° West Longitude orbital location if one of them had been the only DBS provider at that location because this was permitted under the Commission's rules.[57] Viacom and USSB further argue that exclusivity prevents the waste of the spectrum through duplicate transmissions of programming from the same transponder.[58]

24. Discovery also argues that exclusive contracts between vertically integrated programming vendors and non-cable MVPDs do not have the preclusive effect in unserved areas that exists with exclusive contracts involving cable operators because the former type of contracts give consumers the ability to obtain the programming service, while enhancing

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[54] Liberty Media Opposition at 11-12.

[55] USSB Opposition at 14, 15 n.10.

[56] *Id.* at 16 & n.11.

[57] *Id.* at 20 n.13, (citing *Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, Report and Order,* 6 FCC Rcd 2581 (1991)).

[58] *Id.* at 18-20; Viacom Opposition at 10-11.

competition among distributors and diversity in programming.[59] HBO also contends that the agreement with USSB promotes consumer access because multiple retailers will sell HBO, and that the exclusivity applies only against USSB's competitor at the orbital slot, and not with respect to any other DBS or non-cable distributor.[60]

25. Viacom disputes DirecTV's contention that a consumer subscribing to both USSB's and DirecTV's services automatically will pay more than it would if it bought a package from one DBS distributor or cable operator. Viacom relies on evidence in the television receive-only market that shows that subscribers generally pay less in the aggregate to obtain programming from several distributors in contrast to a cable subscriber receiving a similar package.[61] USSB responds to NRTC's claim that USSB's exclusive contract allegedly sets the baseline price for the exclusive programming, stating that USSB is under no requirement to sell a product to its competitor at a price below USSB's cost and that all subscribers will have access to USSB's programming at competitive prices.[62]

26. Opponents further argue that because the DBS industry is a new and developing competitor to cable, DBS distributor exclusivity against another DBS distributor promotes the public interest because it gives strength to such competitors to compete.[63] USSB contends that placing unnecessary restrictions on the ability of DBS distributors to acquire and deliver programming will hinder their ability to compete effectively against cable. USSB further contends that the exclusive contracts at issue are necessary to enable it to compete with DirecTV, which controls more than five times the channel capacity of USSB.[64] Viacom likewise contends that the exclusive agreement with USSB will allow USSB to compete effectively against DirecTV, and thereby guarantee at least two DBS competitors at the 101° West Longitude orbital location.[65] Viacom further contends that in this particular context a *per se* rule will help only DirecTV, and not the DBS marketplace in

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[59] Discovery Opposition at 7.

[60] HBO *Ex Parte* at 7-9.

[61] Viacom *Ex Parte* at 8-9.

[62] USSB First *Ex Parte* at 20.

[63] USSB Opposition at 16-18; Viacom Opposition at 10. Viacom contends that even DirecTV has exclusive rights from several movie studios to exhibit first-run feature length theatrical films on a pay-per-view basis and from other programmers. Viacom further notes that NRTC has exclusive rights to provide DirecTV programming to the rural marketplace. Viacom Opposition at 11 n. 6.

[64] USSB First *Ex Parte* at 27.

[65] Viacom *Ex Parte* at 5-7.

general, because it would significantly weaken USSB's ability to compete against DirecTV.[66] Viacom states that this would result in a concentration of power over DBS by Hughes, a "monopoly in the sky" that could exert more power than even the largest cable operator.[67]

27. USSB disputes NRTC's claim that NRTC needs HBO and Showtime to attract subscribers because NRTC refused USSB's offer to provide its programming (including HBO and Showtime) to NRTC for distribution to its members on a non-exclusive basis.[68] Finally, HBO states that it has legitimate business reasons for entering into the contract with USSB. HBO states that it believes that USSB will better market all of HBO's services than would NRTC; HBO's agreement with USSB provides for multiple distributors in all geographic areas, in contrast with NRTC's exclusivity in rural areas; and USSB, and not NRTC, agreed to carry all feeds of HBO and Cinemax (also owned by Time Warner).[69]

28. Finally, with respect to *Primestar*, USSB argues that "it is unlikely that 40 states would have agreed to the provisions that recognize such exclusive contracts if any question existed whether the Cable Act prohibited such exclusive arrangements."[70] In reply, NRTC disputes USSB's use of the Primestar consent decrees as evidence of the legality of exclusive contracts. NRTC refers to the "savings clause" in the decrees which provides that the decrees do not supersede the 1992 Cable Act or the Commission's rules.[71] In any event, NRTC and DirecTV dispute the relevance of the Primestar proceeding in evaluating the legality of the contracts at issue.[72]

29. NRTC also replies that the Commission's rule does not reflect the *First Report and Order*, which provides that the implementing rule would prohibit vertically integrated programmers from engaging in activities that result in *de facto* exclusivity.[73] NRTC states that the Commission's wording of Section 76.1002(c)(1) is a drafting error. NRTC also argues that it makes little public policy sense to prohibit cable operators from entering into such exclusive arrangements, but allow cable programmers, such as Time Warner and

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[66] Viacom Opposition at 11-12.

[67] Viacom *Ex Parte* at 7-8.

[68] USSB First *Ex Parte* at 17 n.12

[69] HBO *Ex Parte* at 11-13.

[70] USSB Opposition at 6 n.6.

[71] NRTC First *Ex Parte* at 11; NRTC Reply, Attachments A and B.

[72] NRTC Second *Ex Parte* at 6-12; DirecTV *Ex Parte* at 16.

[73] NRTC Reply at 6 (citing *First Report & Order*, 8 FCC Rcd at 3383, ¶ 61).

Viacom, to do so.[74]

30. NRTC further argues that the USSB/Time Warner/Viacom agreement will permit the cable industry to "split" the DBS market, by "hobbling" the competitors, i.e., USSB will have the programming, but limited channel capacity, while DirecTV will have channel capacity but limited programming.[75] NRTC also states that it had legitimate business reasons to refuse USSB's proposal to obtain the services, and states that it should have the ability to obtain HBO and Showtime without having to become USSB's "sales agent."[76]

31. DirecTV replies that exclusivity specifically was disfavored by Congress in this context and, if allowed here, may ultimately be used to apply to all DBS providers at all orbital locations.[77] In response to HBO's argument regarding the limited nature of the USSB contracts, DirecTV argues that all other non-cable technologies may suffer discrimination and fragmentation through similar arrangements with vertically integrated cable programming vendors.[78] DirecTV contends that exclusive contracts will result in consumers dealing with multiple MVPDs to obtain the same programming package they could obtain from a single cable operator. DirecTV concludes that the DBS technology will provide competition to cable only when the services of USSB and DirecTV are combined.[79] DirecTV also contends that each MVPD is entitled to programming regardless of the duplication among competitors.[80] With respect to USSB's arguments that it needs exclusive contracts to compete against DirecTV's larger channel capacity, DirecTV argues that USSB's limited channel capacity was a voluntary business decision and should not provide the basis for a public policy decision.[81]

IV. DISCUSSION

32. Because there are several possible interpretations of the statutory provisions

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[74] *Id.* at 3.

[75] NRTC First *Ex Parte* at 6.

[76] NRTC Second *Ex Parte* at 4-5.

[77] DirecTV *Ex Parte* at 18-20.

[78] DirecTV *Ex Parte* at 12.

[79] DirecTV *Ex Parte* at 17; DirecTV Reply at 8.

[80] DirecTV *Ex Parte* at 18.

[81] *Id.* at 14.

involved here (Sections 628(b) and (c)), to resolve this matter it is appropriate to rely on not just the language of the Act but also (i) a careful analysis of the structure of Section 628 of the 1992 Cable Act, (ii) its legislative history, and (iii) the underlying policy objectives of the 1992 Cable Act. This is the process that previously has been followed in implementing the provisions of the 1992 Cable Act and in developing a coherent set of rules for their enforcement.[82] Having made careful use of that process to assure that the various program access provisions of the 1992 Cable Act fit together in a coordinated fashion, failure to follow that course now could lead to anomalous results.

33. Based on a thorough review of these factors, we believe our initial interpretation of Section 628(c)(2)(C) of the 1992 Cable Act, as reflected in implementing rule Section 76.1002(c)(1), is reasonable and should stand. We believe that this interpretation is supported by the findings and policy set forth in the 1992 Cable Act and its legislative history and best fulfills the underlying purposes of the 1992 Cable Act -- to foster competition to traditional cable systems. We note, however, that in declining to broaden the scope of Section 76.1002(c)(1) -- to prohibit *per se* the exclusive DBS contracts at issue -- we do not preclude the petitioner or any other aggrieved party from seeking relief from such contracts through other appropriate provisions of the 1992 Cable Act. We further find that the *Primestar* proceedings have no relevance to the disposition of the issue before us. The *Primestar Final Judgment* specifically provides that the decrees do not preempt the 1992 Cable Act or the Commission's rules.[83] The basis for the Commission's decision is set forth

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[82] For example, in the *First Report and Order*, the Commission addressed the interpretation of two issues by reviewing the entire 1992 Cable Act, its legislative history and objectives. One issue was whether a finding of competitive harm was a necessary element of the conduct proscribed by Section 628(c). There the Commission concluded "either of two interpretations could be supported by the express language of the statute." *First Report and Order*, *supra*, at 3376, ¶ 46. The Commission determined that harm was not a required element for a complaint brought under Section 628(c). *Id.* at 3377, ¶ 49. The second issue was whether vertical integration referenced in Section 628 includes integration anywhere in the nation or only in the specific market where the competitive issue arises. *Id.* at 3369, ¶ 27. We determined that vertical integration in the specific market is not required. *Id.* at 3369, ¶ 27.

[83] *United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶¶ 70,403, 404 (S.D.N.Y. 1993). *See also*, Transcript of Hearing on Proposed Consent Decree, *State of New York ex rel. Abrams v. Primestar Partners*, No. 93-3868, at 22-23 (S.D.N.Y. Sept. 3, 1993) (presiding judge stating "there is nothing in this decree that binds the FCC in any way ... nor should any finding I make in approving this decree be taken ... as any imprimatur of approval or suggestion that the particular exclusive contracts are lawful or unlawful. That is a matter for the FCC and a matter as to which I would have to defer to the FCC"). Further, in its *Amicus Curiae Memorandum of Law*, the Commission specifically

below.

34. NRTC appears to be arguing that, notwithstanding the directive to the Commission to adopt implementing regulations, Section 628(c)(2)(C) is mandatory in its coverage and clear on its face. We are not persuaded that the Section is clear and unambiguous. Indeed, ambiguity exists when a statute is capable of being construed "by reasonably well-informed persons in two or more different senses."[84] NRTC suggests that the meaning of Section 628(c)(2)(C) can best be revealed by a literal reading, without the parenthetical phrase beginning with "including." NRTC regards this phrase as merely illustrative. While the use of the word "including" does support NRTC's interpretation that the reference to cable operators is simply an example,[85] NRTC's reading would eliminate the defining reference for the words "such programming" that immediately follow. An alternate interpretation of the Section is that the "including" phrase supplies the definition for the whole section through the words "such programming," i.e., programming that is the subject

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recommended against approval of the various decrees warning, *inter alia*, that the court's apparent blessing of exclusivity would encourage arguments by proponents of exclusivity that the Commission should find no need to prohibit exclusivity in light of the court's apparent willingness not to prohibit it. *Memorandum of Law of the Federal Communications Commission as Amicus Curiae* at 14, filed August 23, 1993, *State of New York ex rel. Abrams v. Primestar Partners*, No. 93-3868 (S.D.N.Y.)("*Memorandum*"). Indeed, in support of its position the Commission noted the reconsideration pending in this proceeding and referenced USSB's argument in this proceeding that the Primestar decrees essentially sanction exclusivity in the DBS context. *Memorandum* at n. 24.

[84] *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1557 (E.D.Cal 1992) (citing Sutherland Stat. Const. § 46.04 at 99 (5th ed. 1992)). In this regard, we note that the Commission has received letters from members of Congress involved in legislative debates on the 1992 Cable Act that support conflicting interpretations of that provision. For example, *compare Ex Parte* Letter from Representatives Rick Boucher, Ron Wyden, Jim Slattery, Ralph Hall, Billy Tauzin, Jim Cooper, Blanche Lambert and Mike Synar to Chairman Hundt, June 15, 1994, *with Ex Parte* Letter from Senator Jeff Bingaman to Chairman Hundt, July 6, 1994; *Ex Parte* Letter from Rep. Al Swift to Chairman Hundt, July 8, 1994; *Ex Parte* Letter from Rep. Henry A. Waxman to Chairman Hundt, Aug. 16, 1994; *Ex Parte* Letter from Senators Bob Packwood and Dan Coats to Chairman Hundt, Aug. 24, 1994; *Ex Parte* Letter from Rep. Thomas Manton to Chairman Hundt, Aug. 30, 1994; *Ex Parte* Letter from Representatives Harris W. Fawell, Philip M. Crane, Steven H. Schiff, Carlos J. Moorhead, Scott L. Klug, Cardiss Collins, Jack Fields and J. Dennis Hastert to Chairman Hundt, Aug. 24, 1994.

[85] *Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102, 1112 n. 26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list [] that follows is illustrative, not exclusive.")

of an exclusive contract with a cable operator. Neither interpretation is perfect. NRTC's interpretation would negate the predicate for use of the phrase "such programming." The alternative interpretation would negate the illustrative implication of the term "including." The "including" and the "such programming" language cannot be reconciled simply from the statutory language. Although the language of Section 628(c)(2)(C) is capable of being read to suggest that the Commission is required to consider practices other than exclusive contracts between cable operators and their affiliated programmers within the prohibition, because the legislative history is silent as to conduct that should be prohibited *per se*, other than cable operators' practices, the Commission believes that its current implementing rule is the most reasonable interpretation of Section 628(c)(2)(C).[86]

35. The legislative history of Section 628 specifically, and of the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies, and did not address any such abuses exercised by non-cable technologies, such as DBS. Congress expressly declared its policy to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[87] Congress found that, as a result of increased vertical integration between cable operators and cable programmers, "cable operators have the incentive and ability to favor their affiliated programmers" and "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[88]

36. The legislative history of Section 628(c)(2)(C) more particularly illustrates congressional concern over cable operators' use of exclusivity to stifle competition from other technologies. The Conference Report describes the House provisions on unserved areas (which ultimately were adopted in Section 628(c)(2)(C) with modifications) as follows:

> With regard to areas not passed by a cable system, the regulations required by the House amendment prohibit exclusive contracts and other arrangements between a *cable operator* and a vendor which prevent a multichannel video programming distributor from obtaining programming from a satellite cable programming vendor

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[86] Indeed, if NRTC's interpretation were adopted, it could be argued that NRTC's exclusive marketing agreements, *supra* ¶ 9, could themselves violate this provision of the 1992 Cable Act. Although DirecTV is not a satellite cable programming vendor in which a cable operator has an attributable interest, its exclusive agreement with NRTC precludes competitors of NRTC from accessing certain vertically integrated services that are distributed over DBS only by DirecTV.

[87] 1992 Cable Act, § 2(b)(5).

[88] 1992 Cable Act, § 2(a)(5).

affiliated with a cable operator.[89]

During the House floor debates on the amendment to the House bill (which ultimately became Section 628 with modification) the sponsor and supporters of the amendment emphasized its importance in lifting barriers to entry into the video distribution market by competing technologies imposed by the cable industry's "stranglehold" over programming through exclusivity.[90] In contrast, the legislative history is silent with respect to the use of exclusive programming contracts by non-cable competing technologies. While we recognize that silence as to non-cable technologies is not inherently dispositive in light of the ambiguous statutory language, we give great weight to the legislative history's emphasis on cable operators.

37. Our interpretation is bolstered by the fact that, given the statute's distinction between cable operators' exclusive contracts in areas served and unserved by cable, the Commission's inclusion of DBS exclusive contracts within the *per se* prohibition of Section 628(c)(2)(C) could have an unintended effect on the DBS industry. While Section 628(c)(2)(C) prohibits exclusive contracts between cable operators and programming vendors with cable affiliation in areas that are not served by cable, Section 628(c)(2)(D) allows such contracts in areas that are served and where the Commission determines the contracts are in the public interest. Moreover, DBS distributors, unlike cable operators, would not be required to seek a public interest determination for areas served by cable because Section

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[89] Conference Report at 92 (emphasis added).

[90] *See* 138 Cong. Rec. H6534 (daily ed. July 23, 1992) (statement of Rep. Tauzin) ("There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so . . . our amendment says that exclusive programming that is not designed to kill the competition is still permitted."); 138 Cong. Rec. H6537 (daily ed. July 23, 1992) (statement of Rep. Houghton) ("[The Tauzin Amendment] gives an even break to people who want to get in the business"); 138 Cong. Rec. H6539 (daily ed. July 23, 1992) (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. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart) ("they [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. H6541 (daily ed. July 23, 1992) (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.").

628(c)(2)(D) specifically applies only to cable operators' exclusive contracts. If Section 628(c)(2)(C) is read to prohibit *per se* DBS exclusive contracts, such contracts would be completely permissible in served areas but prohibited in unserved areas. As a result, the DBS operators who do not possess the exclusive rights would have to identify and "block out" the served areas (where such exclusive contracts would be valid), while their distribution in the unserved areas could continue. There is no indication in the legislative history that Congress intended the DBS industry to engage in such an odd and potentially burdensome exercise. Nor is it clear why the DBS exclusive contracts, as opposed to cable exclusive contracts, would turn on whether the area is served *by cable*.

38. Our decision is supported by the rules of statutory construction that require us to examine the whole statute when interpreting a part.[91] While NRTC's interpretation of the "including" phrase, contained in Section 628(c)(2)(C), is a plausible reading taken in isolation, we believe that the more compelling rule of statutory construction is to construe the language in Section 628(c)(2)(C) in a manner most harmonious with the policies and the other provisions of the 1992 Cable Act.[92] We agree with Opponents that Section 628(c)(2)(C), read in conjunction with Section 628(c)(2)(D), supports the common understanding of Congress' intent in this Section to restrict cable operators' use of exclusive contracts in served and unserved areas.[93] The stated purpose of the program access provisions is to increase competition from non-cable technologies, to increase the availability of satellite programming to persons in rural areas and "to spur the development of communications technology,"[94] such as DBS. NRTC's petition runs counter to that

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[91] Sutherland Stat. Const. §§ 46.05, 47.02 at 103, 139 (5th ed. 1992); *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)("When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the legislature."); *see also Richards v. United States*, 369 U.S. 1, 11 (1962); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

[92] Viacom *Ex Parte* at 18 n.18 (citing Sutherland Stat. Const. § 46.05 at 103 (5th ed. 1992)).

[93] USSB Opposition at 6-7. Indeed, the contemporaneous understanding of Sections 628(c)(2)(C) and (D), that these sections only restricted cable operators' exclusive contracts, was articulated by most parties involved in the original rule making, including DirecTV. *See* Reply Comments of DirecTV in MM Docket 92-265, filed Feb. 16, 1993, at 12 n.11 and Appendix (summary of Tauzin amendment) ("The Commission is directed to prohibit any arrangement between a cable operator and a programming vendor, including exclusive contracts, which would prevent a distribution competitor from providing programming to persons unserved by a cable operator.").

[94] 47 U.S.C. § 548(a).

objective. Indeed, NRTC's interpretation of Section 628(c)(2)(C) necessarily would include any MVPD's exclusive contract and broaden the reach of the *per se* prohibition to all non-cable MVPDs. We believe that an outright ban on any MVPD exclusive contracts in areas unserved by cable, without any determination of the effect of such exclusivity on competition, defeats the very purpose of the 1992 Cable Act to foster competition from other non-cable technologies.

39. In addition to our interpretation of the statute, we find no evidence in the pleadings submitted in this proceeding that non-cable exclusive contracts of the type involved here are either harmful to the development of competition, "unfair" or "deceptive," or have negative effects on consumers. The record does not demonstrate that such contracts will hinder the development of DBS as an effective competitor to cable; that USSB's contracts with Viacom and Time Warner have impeded the entry either of DirecTV or NRTC into the DBS marketplace; or that the contracts generally have harmed the entry of DBS service into the multichannel video programming marketplace. Indeed, the evidence presented suggests that a DBS distributor's exclusive contract for programming covering one orbital location may foster DBS as a significant competitor to cable. Such contracts may allow a distributor to distinguish its service from that of another, avoid duplication of programming, and eventually lead to more diversity in programming for the consumer.[95] To the extent such contracts allow a greater number of DBS distributors to establish distinctive competing services, we believe they further congressional policy to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming."[96] In contrast to cable exclusivity in areas unserved by cable, which would foreclose services from non-cable multichannel video programming distributors, consumers will be able to receive all DBS programming from one DBS provider or another by being able to select specific programming services without having to purchase entire programming packages.[97] We agree with Opponents that prohibiting a DBS distributor's exclusive contract for programming covering one orbital location may in fact create unnecessary inefficiencies because the same programming could then occupy multiple transponders on the same satellite and decrease the diverse mix of programming available. Without prejudging any future complaints, we currently believe that the record before us provides no basis to conclude that the market power abuses, about which Congress was concerned, are present in the exclusive contracts at issue here.

40. Our reaffirmation of our interpretation of Section 628(c)(2)(C) does not foreclose all remedies to an MVPD that claims to be aggrieved by an exclusive contract between a non-cable MVPD and a vertically integrated satellite cable programming vendor. In the *First Report and Order*, we previously determined that while Section 628(b) does not

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[95] Viacom *Ex Parte* at 5-6; HBO *Ex Parte* at 7-8.

[96] *First Report & Order*, 8 FCC Rcd at 3369, ¶ 27 (citing 1992 Cable Act § 2(b)(2)).

[97] USSB Opposition at 14.

specify types of "unfair" practices that are prohibited, it "is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[98] The Commission did not sanction exclusive contracts between non-cable MVPDs and vertically integrated cable programming vendors, thus leaving open the possibility that such contracts could be challenged on the basis that they involve non-price discrimination or "unfair practices." Section 628(b) of the 1992 Cable Act and the Commission's implementing rule, Section 76.1001, provide a broad prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[99] Also in the *First Report and Order*, the Commission stated that Section 628(b) does not prescribe specific practices (in contrast to Section 628(c)), but does require a showing of anti-competitive harm, i.e., that the purpose or effect of the complained of conduct is to "hinder significantly or to prevent an MVPD from providing programming to subscribers or customers."[100] The Commission has stated that the objectives of the "unfair practices" provision are to provide a mechanism for addressing conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming fields, that inhibits the development of multichannel video programming distribution competition.[101] Therefore, where future contracts cause a restriction in the availability of programming to alternative distributors and their subscribers, an aggrieved MVPD could seek redress by filing an "unfair practices" complaint under Section 76.1001 of the Commission's rules.

41. Finally, we believe that using Section 76.1001 as an avenue to address non-cable exclusive contracts, such as those at issue here, will afford the Commission the opportunity to consider all the ramifications of such contracts, including the effect on competition, based upon the particular facts of each case. This case-by-case review will avoid amending a Commission rule to create an overly broad *per se* prohibition that appears to be contrary to Congress' intent.

42. For the reasons discussed above, we reaffirm our interpretation of Section 628(c)(2)(C) as reflected in our implementing rule. We believe that this is the most reasonable interpretation based on the fact that Congress specifically directed the Commission to prohibit exclusive contracts between cable operators and vertically integrated programming vendors in unserved areas, but did not specifically address the inclusion of exclusive

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[98] *First Report & Order*, 8 FCC Rcd at 3374.

[99] 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001.

[100] *First Report & Order*, 8 FCC Rcd at 3377.

[101] *Id.* at 3373, ¶ 40.

contracts between non-cable MVPDs and vertically integrated programming vendors within Section 628(c)(2)(C)'s prohibition. We believe that any complaints regarding exclusive agreements are more appropriately addressed through other provisions of the statute. Thus, the Commission denies NRTC's request.

V. REGULATORY FLEXIBILITY ACT ANALYSIS

43. A final Regulatory Flexibility Act statement was published in the *First Report and Order* in MM Docket 92-265, at Appendix D. The decision taken here does not change that analysis.

VI. ORDERING CLAUSE

44. Accordingly, IT IS ORDERED, that the Petition for Reconsideration of the National Rural Telecommunications Cooperative IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary