was concerned with expanding the availability of programming and eliminating unjustified discrimination in the price charged to non-cable technologies.2 Congress noted that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel video programming distributors ("MVPDs").3 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.4 Direct broadcast satellites were among the technologies that were to be fostered through the program access provisions of the 1992 Cable Act.5

4. 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 United States Satellite Broadcasting, Inc. ("USSB"), which is owned by Hubbard Broadcasting, Inc. The satellite is situated at the 101° West Longitude orbital position. DirecTV owns eleven of the sixteen transponders on DBS-1 and USSB owns the remaining five. On June 17, 1994, DirecTV and USSB began providing DBS service to the entire continental United States. Currently, DirecTV offers 150 channels and USSB offers 20 channels. 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 other orbital locations.

5. NRTC is the exclusive marketer and distributor of DirecTV programming in certain specified rural areas. The DBS distribution agreement between DirecTV and NRTC requires DirecTV to obtain certain programming on behalf of NRTC.

USSB entered into exclusive distribution agreements with Viacom and Time Warner, two vertically integrated satellite cable programming vendors, to carry HBO and Showtime, respectively, granting distribution rights at the 101° West Longitude orbital location.⁶ The agreements do not restrict access to the programming by multichannel multipoint distribution services ("MMDS"), satellite master antenna television ("SMATV"), or Cband satellite distributors; and the agreements do not restrict access by any DBS distributor at any other orbital location.

III. Discussion

6. Because there are several possible interpretations of the statutory provisions involved here (sections 628(b) and (c)), to resolve this matter it is appropriate to rely not just on the language of the Act but also on a careful analysis of the structure, legislative history, and the underlying policy objectives of section 628 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. 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.

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 § 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 § 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 contrary to all parties' assertions, the final judgments issued in the federal antitrust actions against Primestar Partners, that involved allegations of anticompetitive restrictions on access to cable programming, 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.⁷

8. We are not persuaded that section 628(c)(2)(C) 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." 8 NRTC

⁷ 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 any way * 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 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.

8 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.

² 1992 Cable Act, sections 2, 19, Communications Act section 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).

³ 1992 Cable Act, section 2(a)(5).

⁴ See 138 Cong. Rec. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart in support of the Tauzin amendment).

⁵ House Report at 165–66 (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

 $^{^6\,\}text{The DBS--1}$ satellite at the $101^\circ\,\text{West Longitude}$ 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 highpower DBS satellites. These eighth 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.