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

In the Matter of	)	
	)	IB Docket No. 95-168
Revision of Rules and Policies for the	)	PP Docket No. 93-253
Direct Broadcast Satellite Service	)	

COMMENTS OF THE STATE OF HAWAII

The State of Hawaii ("State"),[1] by its attorneys, submits the following comments in response to the Notice of Proposed Rulemaking ("Notice") which the Commission issued in the above-captioned proceeding on October 30, 1995.[2] In the Notice, the Commission has proposed a number of new rules for the Direct Broadcast Satellite ("DBS") service, including rules intended to ensure the timely provision of DBS service to Hawaii.[3]

I. INTRODUCTION

In its 1991 Report and Order on DBS service, the Commission recognized the importance of making DBS service available on a nationwide basis, but temporarily refrained

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[1] The State files these comments through its Department of Commerce and Consumer Affairs.

[2] See Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 95-168, PP Docket No. 93-253, FCC 95-443 (rel. Oct. 30, 1995) ("Notice").

[3] See id. at ¶ 4.

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from specifically requiring operators to serve Hawaii and Alaska.[4] The Commission, however, promised that "should it appear, as DBS develops, that Alaska and Hawaii will not be adequately served, we will not hesitate to revisit this issue . . . ."[5] The State wishes to commend the Commission for honoring this pledge.

As the Notice makes clear, DBS service has developed considerably, *but is still not available in Hawaii and Alaska*. Nor do any permittees plan to implement such service in the near future.[6] The Commission has therefore proposed to require new DBS permittees, including those receiving permits for eastern orbital slots, to serve Hawaii and Alaska to the extent technically feasible.[7] In addition, the Commission has proposed to condition the retention of permits for western orbital locations on the introduction of service to Hawaii and Alaska.[8]

The State is pleased that the Commission has taken advantage of the opportunity presented by this proceeding to propose specific service requirements for Hawaii and Alaska on certain DBS permittees.[9] The need for these requirements cannot be overemphasized. Without Commission action at this time, DBS operators could well develop their first generation of satellites without ever introducing service to Hawaii and Alaska. As a result, the residents of

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[4] See Uses of Orbital Allocations in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581, 2582 (1991) ("DBS Orbital Allocations").

[5] Id at 2583.

[6] See id. at ¶¶ 10, 68.

[7] See id. at ¶ 70.

[8] See id.

[9] See Reply Comments of the State of Hawaii, CS Docket No. 95-61 (filed July 28, 1995).

these states could be denied the substantial benefits of DBS service into the next decade and beyond. With some adjustments, the rules proposed by the Notice should avoid this unacceptable result.

II. THE LACK OF DBS SERVICE TO HAWAII HAS FRUSTRATED CONSUMERS AND WILL DENY THEM THE BENEFITS OF DBS SERVICE

Consumers in the continental United States have greeted the roll-out of DBS service with great enthusiasm.[10] In some markets the demand for DBS equipment has exceeded supply[11] and even more dramatic growth in the demand for DBS service is expected over the next few years.[12] Like their counterparts in the continental United States, consumers in Hawaii want to share in the benefits derived from access to this important new technology. But time and time again, the State's Department of Commerce and Consumer Affairs has had to explain to frustrated consumers -- who are exposed regularly to advertisements for DBS service -- that DBS service is not yet available in Hawaii. Unfortunately, this is not the only negative effect of the lack of DBS service to Hawaii.

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[10] See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 10 FCC Rcd 7442, 7475 (1994) ("Annual Competition Report").

[11] See id. at 7475.

[12] More specifically, the United States Satellite Broadcast ("USSB") "predicts that between one and two million dishes will be sold within a year, and between five to ten million will be sold within three years. DirecTV projects that it will have over three million subscribing households within three years. USSB estimates that in seven years, almost forty percent of all television households may receive programming via DSS equipment." Id. at 7478.

In addition, the lack of DBS service has deprived the residents of Hawaii of the substantial marketplace benefits yielded by DBS service. As explained by the Commission, services such as DBS generate competition in the market for multichannel video programming[13] and, as a result, afford consumers with "a substantially broadened array of programming options . . . more pricing options . . . [and] a stimulus to more rapid development of new technologies and product innovation."[14] The lack of DBS service to Hawaii will clearly result in the denial of such benefits to the State's residents. Such a result would be inconsistent with the Commission's stated goal of ensuring that DBS service is made available on a truly nationwide basis.

III. THE COMMISSION SHOULD ADOPT STRONG MEASURES TO ENSURE THE INTRODUCTION OF DBS SERVICE TO HAWAII

The Communications Act of 1934 obligates the Commission to "make available so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, . . . wire and radio communication service . . . ."[15] In accordance with this mandate, the Commission has long-recognized the need to make DBS service available to all Americans.[16] The

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[13] Based on the tremendous growth of DBS service in the continental United States, the Commission now views DBS as "a potential long-term viable competitor to cable." Id. at 7474.

[14] Id at 7542.

[15] 47 U.S.C. § 151 (emphasis added).

[16] See DBS Orbital Allocations, 6 FCC Rcd at 2582 (proclaiming that the Commission "is determined to ensure that DBS service is provided throughout the country, including Alaska and Hawaii"); Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Administrative Radio

Commission, however, has refrained from imposing specific service requirements on DBS operators until the plans of industry have "crystallized."[17] Now that these plans have crystallized, it is clear that none of the DBS permittees plans to serve all Americans in the near future.[18] The State is pleased that the Commission has proposed incentives and specific service requirements designed to achieve the important goal of truly nationwide DBS service, but urges the Commission to ensure that these measures actually cause DBS operators to introduce service to Hawaii in the near future.

Experience reveals that it may be appropriate to provide DBS operators with an incentive to provide service from western orbital slots. Accordingly, the State supports the Commission's plan to allow DBS operators to serve international points, such as those in the Pacific Rim, if authorized by foreign governments.[19] The State also wishes to endorse the Commission's proposal to afford DBS operators greater flexibility in their use of channels for non-DBS services.[20] As explained by the Notice, allowing 50 percent of the capacity of each

Conference, Notice of Proposed Policy Statement and Rulemaking, 86 F.C.C.2d 719, 728 (1981) (recognizing that "DBS systems will have a unique capability to provide television and other video services to all the people of the United States") (emphasis added), Report and Order, 90 F.C.C.2d 676, 680, (stating that "the statutory goal of providing equitable distribution of service throughout the nation, *see* 47 U.S.C. § 307(b), will be furthered by authorizing DBS service . . .") (emphasis added).

[17] DBS Orbital Allocations, 6 FCC Rcd at 2582.

[18] See Notice at ¶¶ 10, 68.

[19] See id. at ¶¶ 24, 65; see also Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd 7789, 7793 (1995).

[20] See Notice at ¶¶ 28-30.

transponder to be used to provide non-DBS services will give DBS operators flexibility to implement their business plans, which could entail the use of western orbital locations.[21]

Incentives alone, however, are not enough. As the Notice correctly observes, stronger measures are necessary "to achieve . . . [the] goal of truly nationwide DBS service."[22] The State therefore supports the Commission's proposal to condition the retention of permits for western orbital slots on the introduction of service to Hawaii.[23] In addition, the State supports the thrust of the Commission's proposal to require all new DBS permittees, including those acquiring permits for eastern orbital slots, to serve Hawaii if technically feasible.[24] However, some adjustments to this proposal are warranted.

More specifically, the State submits that a better approach would be to simply require all new DBS permittees to introduce service to Hawaii and Alaska. Under this approach, permittees that believe such service is not technically feasible from eastern orbital slots would be required to petition for a waiver of their obligation to serve Hawaii and Alaska. Plainly, there should be no question concerning the technological feasibility of serving Hawaii and Alaska

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[21] See id. at ¶¶ 30, 65.

[22] Id. at ¶ 69.

[23] See id. at ¶ 70.

[24] See id.

from western orbital locations.[25] Accordingly, the Commission should specify that new permittees for western orbital locations are not eligible for waivers.

In view of the advanced state of DBS technology, waiver petitions submitted by permittees for eastern orbital slots should be subject to rigorous scrutiny. The Commission also should define "technical infeasibility" in this proceeding. In this regard, the Commission should specify that cost alone is not sufficient to warrant a finding of infeasibility and clarify that the burden of demonstrating infeasibility falls squarely on the permittee.

A less stringent waiver standard could provide DBS operators a "loophole" which could jeopardize the goal of truly nationwide service. For example, if DBS operators in eastern orbital locations are allowed to circumvent service requirements on the basis of technical arguments that are economically driven, Hawaii will have to await DBS service from western orbital locations. But there is no guarantee -- despite the rules proposed by the Notice -- that any permittees will launch a satellite to a western orbital slot. This, of course, could leave Hawaii without DBS service. This possibility underscores the need to subject all waiver petitions to rigorous review on the basis of technical, and not economic, merit.

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[25] Indeed, in 1991 Advanced Communications Corporation stated that "coverage from Alaska and Hawaii from western locations will be practical and that it plans to offer this service . . . from its 148° W position." DBS Orbital Allocations, 6 FCC Rcd at 2582. If it was practical for Advanced to offer service to Hawaii in 1991, it should definitely be possible for a new permittee to offer the same service from the same orbital location.

The Commission should make bidders aware that they should consider the cost of service to Hawaii and Alaska in preparing their bids.[26] The Commission should also explain that successful bidders for eastern orbital slots who later receive waivers based on technical infeasibility will be required to pay a supplemental fee. Such a fee would be necessary to recoup the benefit received by the permittee in the form of a lower auction price as a result of the service obligations attached to the permit. The Commission should explore ways to use such fees to encourage service to Hawaii and Alaska. For example, the fees could be used to defray the costs of any permittee that actually institutes service to Alaska and Hawaii.

Finally, to ensure the timely introduction of DBS service to Hawaii,[27] the Commission should hold all new permittees, including those planning to provide service to Hawaii from eastern orbital locations, to the due diligence requirements proposed by the Notice.[28] Under this timetable, new permittees would be required to complete the construction of their first satellite within at least four years of authorization and to introduce service to Hawaii within six years.[29] Existing permittees for western orbital locations should also be required to comply with these milestones. This would allow existing permittees sufficient time to construct and launch a satellite for their western orbital positions. Any further delays in the

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[26] The State notes that in the Notice the Commission suggested that bids should reflect the fact that service may be permitted to international points. See Notice at ¶ 24.

[27] See id. at ¶ 4.

[28] See id. at ¶ 27.

[29] See id.

introduction of service to Hawaii simply "are no longer warranted in an era of proven operation and rapid growth in the DBS service."[30]

IV. CONCLUSION

For the reasons set forth above, the State urges the Commission to condition the retention of all permits for western orbital slots on the provision of DBS service to Hawaii, to require all new DBS permittees to provide DBS service to Hawaii, and to ensure that these rules create no loopholes which permittees can exploit to the further detriment of the residents of Hawaii.

Respectfully submitted,

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[30] Id. at ¶ 25.