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**By Hand**

William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

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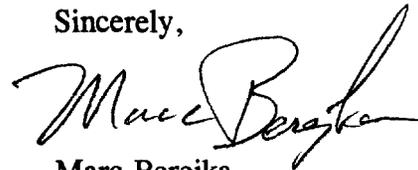
Re: Notice of Written Ex Parte Presentation -- IB Docket No. 96-111

Dear Mr. Caton:

On behalf of the State of Hawaii, we are submitting for inclusion in the above docket the State's response to the International Bureau's "Request for Comment on U.S.-Mexico DTH-FSS/BSS Protocol," DA 96-1309. The State is doing so because the points that the State raises in its comments are arguably responsive to questions that the Commission has raised in IB Docket No. 96-111.

In accordance with Section 1.1206(a) of the Commission's rules, two copies of the document are being submitted for inclusion in the public record. Please contact me if you have any questions.

Sincerely,



Marc Berejka

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AUG 26 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Request for Comment on ) DA 96-1309  
U.S.-Mexico )  
DTH-FSS/BSS Protocol )

**COMMENTS OF THE STATE OF HAWAII**

The State of Hawaii, by its attorneys, hereby offers one factor that the International Bureau should take into account in its consultations with the Executive Branch as the U.S. Government proceeds towards concluding a Protocol with Mexico on the provision to each other's territory of direct-to-home fixed-satellite and broadcast-satellite ("DTH-FSS/BSS") services.<sup>1</sup> In particular, the State urges the Commission to take steps to ensure that the Protocol does not undermine the Commission's "important goal of bringing [Direct Broadcast Satellite] service to . . . underserved regions" of the United States, such as Hawaii.<sup>2</sup> To this end, the State asks that any U.S. Government consent or license which permits a Mexican Direct Broadcast Satellite ("DBS") system to serve the U.S. be granted only if: (1) the system includes Hawaii in its coverage area; or (2) if it is claimed such coverage is technically infeasible, that the permittee (or licensee) demonstrate that the

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<sup>1</sup> These comments are filed by the State through its Department of Commerce and Consumer Affairs. A division of the Department -- the Cable Television Division -- is the State's cable franchise administrator.

<sup>2</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, IB Docket No. 95-168, PP Docket No. 93-253, at ¶ 126 (released Dec. 15, 1995).

Mexican DBS operations will not adversely affect the development of competitive DBS service in Hawaii.<sup>3</sup>

## I. BACKGROUND

The citizens of Hawaii do not now have access to DBS service, nor is it clear when they will. To address this situation, the State has expended its scarce resources over the past year participating in various Commission proceedings that concern the development of competition among multichannel video programming distributors. In those proceedings, the State has urged the Commission to, at long last, require U.S. providers of DBS service to include Hawaii in their coverage plans so that, in furtherance of Section 1 of the Communications Act, Hawaiians are not foreclosed from receiving the benefits of this exciting new service.<sup>4</sup>

Just last December, the Commission concluded that extending DBS service to Hawaii (and Alaska) both is an important national objective and is now technically feasible. More specifically, in its Revision of Rules and Policies for the Direct Broadcast Satellite Service, the Commission found that the DBS industry is increasingly mature; that it is uncertain whether DBS service will be provided outside the contiguous United States in the

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<sup>3</sup> These comments will also be filed as a written ex parte presentation in the Commission's ongoing DISCO II proceeding, since the points the State raises here are arguably responsive to questions that the Commission has raised there. See Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111, FCC 96-210 (released May 14, 1996).

<sup>4</sup> See 47 U.S.C. § 151 (requiring the Commission "to make available, so far as possible, to all people of the United States . . . wire and radio communication service").

near term; and that it is now important to take concrete steps to ensure consumers in non-contiguous points enjoy the full benefits of DBS.<sup>5</sup> To this end, the Commission amended its DBS rules to require all new U.S. DBS licensees to provide service to Hawaii and Alaska, or to demonstrate why such service is not technically feasible. And although the Commission declined to require existing U.S. licensees to reconfigure their systems to accommodate Hawaii, all licensees (existing and new) must relinquish their western orbital slots and channels (at 148° W.L., 157° W.L., 166° W.L., or 175° W.L.) if they are not serving Hawaii and Alaska by the end of their initial license terms.<sup>6</sup> The Commission also said that "[a]ny party acquiring channels at [the 101° W.L. or 61.5° W.L.] locations that desires not to provide service to Alaska or Hawaii will bear the burden of showing that such service is not feasible as a technical matter. . . ."<sup>7</sup>

This rule change enhances the likelihood that a healthy DBS market will develop in Hawaii in two related ways. It encourages new U.S. applicants to plan to serve Hawaii or face the possibility that their applications will be denied, and it gives the Commission and the public the opportunity to scrutinize any effort to omit Hawaii from coverage and possibly persuade the applicant not to do so.

The Commission's rule change, however, does not guarantee that Hawaiians will enjoy the full benefits of DBS service. This fact has been made clear by the recent applications by TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc. to use

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<sup>5</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, at ¶¶ 125-28.

<sup>6</sup> See id. at Appendix B (establishing 47 C.F.R. § 100.53).

<sup>7</sup> Id. at ¶ 128.

more easterly, Canadian orbital slots -- at 90° W.L. and 82° W.L., respectively -- to provide DBS service to the Mainland U.S. In their applications, neither TelQuest nor WTCI made a firm commitment to provide DBS service to Hawaii. In response, the State has asked the Commission not grant the applications if doing so would undermine the Commission's policies encouraging U.S. DBS licensees to serve Hawaii. The State fears that, notwithstanding the Commission's regulatory requirement, the potential market for DBS service in Hawaii will be stillborn if the DBS market on the Mainland is saturated by providers that serve only the Mainland. To stave off that possibility, the State has urged the Commission to require both TelQuest and WTCI to firmly commit themselves to serving Hawaii or to demonstrate why serving Hawaii is technically infeasible; and if they allege that service to Hawaii is technically infeasible, to demonstrate how their proposed systems will not adversely affect the development of a healthy DBS market in Hawaii.<sup>8</sup>

The U.S.-Mexico DTH-FSS/BSS Protocol should incorporate the same requirements, so that Mexican DBS systems likewise are precluded from undermining the Commission's geographic coverage requirements for DBS.

## **II. THE PUBLIC INTEREST REQUIRES THAT ALL AMERICANS ENJOY THE BENEFITS OF A COMPETITIVE DBS MARKET**

The State's concern that its citizens might be foreclosed from the full benefits of DBS service is becoming more palpable each day. Three DBS systems already are deployed in eastern orbital slots. DIRECTV and USSB share capacity at one orbital slot.

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<sup>8</sup> See Comments and Request for Leave to File of the State of Hawaii, FCC File Nos. 758, 759 & 844-DSE-P/L-96 (filed June 27, 1996).

Echostar's first satellite is operating in another orbit. None of the systems is designed to serve Hawaii. Collectively, however, the systems are rapidly creating and penetrating the Mainland market for DBS service. Consumers are purchasing the 18-inch parabolic antenna which is used to receive DBS video programming at record rates, and the device may prove to be, at least on the Mainland, the most successful consumer electronics product ever developed.<sup>9</sup> This phenomenon is now being accelerated by a price war which has dramatically reduced the price of DBS antennas. At the same time, there is substantial uncertainty over how many DBS systems the market can bear, especially as incumbent cable systems begin to digitize their operations.<sup>10</sup> Thus, not only is Hawaii still without any DBS service, but it is increasingly difficult to foresee when, if ever, the citizens of the State will enjoy the benefits of competitive DBS service that citizens on the Mainland currently enjoy.

The efforts of TelQuest and WTCI have only confirmed the State's fears by raising the possibility that non-U.S. satellites might be allowed to serve the U.S. Mainland, while omitting Hawaii from their coverage. To date, both companies, in response to the State's concerns, have at best claimed that they might be able to serve Hawaii. WTCI, for example, has claimed that the "antenna for [its] satellites are being configured to provide the best service to Hawaii and Alaska that is technically feasible."<sup>11</sup> However, WTCI has failed to provide any assurance that DBS service actually would be offered to Hawaii. WTCI has

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<sup>9</sup> See Comments of Satellite Broadcasting and Communications Ass'n of America, IB Docket No. 95-59, at 7-8 (filed July 14, 1995).

<sup>10</sup> See "Direct-to-Home Satellite Business Set for Shake-Ups on Service, Pricing," Telecommunications Reports, at 16-18 (Aug. 19, 1996).

<sup>11</sup> Response of Western Tele-Communications, Inc., FCC File No. 844-DSE-P/L-96, at 4 (filed July 3, 1996).

never described what service is "technically feasible." Indeed, WTCI has admitted that there might be issues as to its satellites' power levels and look angles which would, in some unspecified way, affect service to Hawaii -- but the company has not indicated which areas of Hawaii would not be served.<sup>12</sup>

Mexican DBS satellites seeking to serve the U.S. would give rise to the same issues. In fact, a recent press report indicates that if WTCI fails to secure Commission authority to distribute DBS service from a Canadian orbital slot WTCI's parent company, TCI, would consider deploying the same DBS satellite in a Mexican orbital slot at 79° W.L.;<sup>13</sup> i.e., further east than the Canadian orbital slot that WTCI would access, making service to Hawaii even less likely because of the more severe look angle problems.<sup>14</sup>

Ultimately, Mexican DBS systems should be held to no lesser standard than U.S. systems with regard to the Commission's coverage policies. If an entity wants to uplink DBS programming to a Mexican satellite for consumption in the U.S., it should abide by the Commission's rules designed to promote truly nationwide availability of DBS service. Any other result would be inequitable to the citizens of Hawaii and would undermine the Commission's mandate under Section 1 of the Communications Act. Moreover, to the extent DBS evolves into a two-way telecommunications service, as is anticipated, exclusion of

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<sup>12</sup> See Reply of the State of Hawaii, FCC File Nos. 758, 759 & 844-DSE-P/L-96 (filed July 12, 1996).

<sup>13</sup> See "TCI Interested in Buying Out Primestar Partners," Communications Daily, at 3 (Aug. 23, 1996).

<sup>14</sup> Any such plan would likely undo the earlier plans of TCI's other affiliate, Tempo, to serve Hawaii from Tempo's U.S. orbital slots at 119° W.L. and 166° W.L. Use of the Mexican slot thus could result in Tempo abandoning those slots, further harming the interests of Hawaii's consumers.

Hawaii from DBS coverage would also undermine the Commission's new universal service mandate under Section 254(b) of the Act. That provision obligates the Commission to take steps to ensure consumers in insular areas are provided advanced telecommunications services that are comparable to those available in the rest of the U.S.<sup>15</sup>

No one should be exempted from the Commission's DBS coverage policies merely because they have arranged to utilize channels at foreign orbital slots. Moreover, if any such entity alleges that providing service to Hawaii is technically infeasible, those allegations not only should be carefully scrutinized, but the proponent(s) also should be required to demonstrate that the Hawaii DBS market will not be adversely affected. They should be required to document the effects of bypassing the Hawaiian market on the development of DBS service in that market. If they do not intend to serve Hawaii, they should, for example, address how the remaining U.S. DBS orbital capacity would be devalued, and what the likelihood would be that U.S. domestic capacity would remain fallow or be used less intensively as a result of the activities.

In sum, the Commission should view with suspicion, and scrutinize, any new excuse that suggests either directly or indirectly that Hawaii should not receive DBS service. The addition of a new entity which does not serve Hawaii -- regardless of which countries' orbital slots are used -- would further reduce the chances that DBS service (with all of its anticipated capabilities) will grow healthily in Hawaii as it is now doing on the Mainland, and it will greatly limit competition in the Hawaiian market. If such an entity were allowed

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<sup>15</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (enacting 47 U.S.C. § 254(b)).

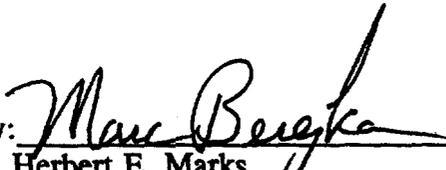
into the U.S. Mainland market, there is a very real chance that the health of the envisioned DBS market in Hawaii would be diminished -- to the detriment of Hawaii's consumers and the Commission's pro-consumer, pro-competitive policies.

### III. CONCLUSION

For all of the foregoing reasons, the State of Hawaii urges the Commission to consider these comments, and consistent with them, to take steps in its consultations regarding the Protocol to further the Commission's goal of promoting truly nationwide competition in the provision of DBS service.

Respectfully submitted,

STATE OF HAWAII

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