

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

In the Matter of )  
 )  
Policies and Rules for the ) IB Docket No. 98-21  
Direct Broadcast Satellite Service )  
 )

**COMMENTS OF  
THE STATE OF HAWAII**

The State of Hawaii (“Hawaii” or the “State”),<sup>1</sup> through its attorneys, hereby submits comments in response to the Commission’s Public Notice (“Notice”) seeking to refresh the record in the Part 100 rulemaking proceeding that the Commission issued in the above-captioned docket.<sup>2</sup> The Commission sought additional comment on its rules for non-conforming use of Direct Broadcast Satellite (“DBS”) spectrum.

The State recommends that the Commission liberalize its rules by implementing a non-conforming use policy that promotes the further expansion of DBS service by allowing additional non-conforming use of DBS spectrum, provided that geographic service equality is assured. In making this recommendation, the State must reiterate its dissatisfaction with the inadequate and inequitable provision of DBS to consumers in Hawaii. The State strongly encourages the Commission to clarify and enforce its current geographic service requirements in order to ensure that adequate DBS service is made available to all Americans.

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<sup>1</sup> These comments are submitted by the State of Hawaii 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> See Public Notice, *The Commission Requests Further Comment in Part 100 Rulemaking Proceeding on Non-Conforming Use of Direct Broadcast Satellite Service Spectrum*, FCC 00-426 (Dec. 8, 2000); see also *Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd 6907 (1998).

## I. INTRODUCTION

It is commendable and important to encourage increased usage of DBS spectrum for consumers, such as through the launch of satellites to the currently underutilized western orbital slots. Any liberalization of the Commission's regulations for DBS, however, should be subordinate to Section 100.53 of the Commission's rules, which was adopted to ensure that DBS licensees adequately serve residents in Alaska and Hawaii.<sup>3</sup> As the Commission is well aware, DBS operators have systematically undermined the effectiveness of this rule.<sup>4</sup> It is imperative that all areas of the United States receive DBS service that is generally comparable in quality, price and content. Any new regulations related to DBS should reflect, and certainly not undermine, this obligation.

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<sup>3</sup> 47 C.F.R. § 100.53. The rule states:

- (a) Those holding DBS permits or licenses as of January 19, 1996 must either:
  - (1) Provide DBS service to Alaska and Hawaii from one or more orbital locations before the expiration of their current authorizations; or
  - (2) Relinquish their western DBS orbital/channel assignments at the following orbital locations: 148° W.L., 157° W.L., 166° W.L., and 175° W.L.
- (b) Those acquiring DBS authorizations after January 19, 1996 must provide DBS service to Alaska and Hawaii where such service is technically feasible from the acquired orbital location.

<sup>4</sup> See *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, Comments of the State of Hawaii, IB Docket No. 98-21, at 3, 9 (April 6, 1998) ("*Hawaii NPRM Comments*") (urging the Commission to clarify the requirements of its geographic service rules); *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, Reply Comments of the State of Hawaii, IB Docket No. 98-21, at 2 (Apr. 21, 1998). In addition to filing comments and reply comments in this proceeding, the State has held several *ex parte* meetings and telephone calls with the Commission over the last two years. See, e.g., *Ex Parte Presentation by Herbert Marks and Bruce Olcott*, IB Docket No. 98-12 (July 14, 1998); *Letter to Regina Keeney from Herbert E. Marks*, IB Docket No. 98-21 (Aug. 11, 1998); *Ex Parte Presentation by Sanford T. Inouye, Herbert E. Marks, and Bruce A. Olcott*, IB Docket No. 98-21 (June 24, 1999)(discussing the consolidation of the DBS industry); *Ex Parte Presentation by Herbert E. Marks and Bruce A. Olcott*, IB Docket No. 98-21 (Nov. 3, 1999); *Permitted Oral Ex Parte Presentation by Bruce A. Olcott*, IB Docket No. 98-21 (Oct. 30, 2000); *Permitted Oral Ex Parte Presentation by Herbert E. Marks and Bruce A. Olcott*, IB Docket No. 98-21 (Nov. 9, 2000); *Letter to Mr. Donald Abelson from Herbert E. Marks and Bruce A. Olcott*, IB Docket 98-21 (Nov. 21, 2000). Additionally, the State filed petitions to deny authorization to launch satellites on the basis of discrimination on several occasions. See *Request for Declaratory Ruling the EchoStar's Construction and Operation Milestones Have Been Satisfied or, Alternatively, Petition for Additional Time to Satisfy the Milestones*, Petition to Deny of State of Hawaii, FCC File Nos. SAT-PDR-19991217-00128, 74-SAT-PIL-96 (Dec. 17, 1999); *In the Matter of DIRECTV Enterprises, Inc. Launch and Operating Authority*, Petition to Deny of State of Hawaii, File No. SAT-LOA-20000505-00086 (July 6, 2000).

Recognizing these twin public interest goals, the State makes the following specific recommendations:

- Both U.S.-licensed and non-U.S. licensed DBS operators should be permitted to use non-full CONUS orbital slots<sup>5</sup> to provide *any* direct-to-consumer services in unlimited quantity, subject to a stringent geographic service requirement:
  - Specifically, any services (whether conforming, or non-conforming) that are provided using *western* non-full CONUS DBS orbital slots must be made available to consumers in Alaska and Hawaii at prices and service levels (with respect to quality, reliability, outages, error rates, speed, total bandwidth and quantity of services) that are comparable with the services available to other customers.
- Both U.S.-licensed and non-U.S. licensed DBS operators that utilize full-CONUS orbital slots<sup>6</sup> should be required to comply with the Commission’s existing non-conforming use policy, along with a clarified geographic service requirement:
  - Specifically, DBS operators are required to use full-CONUS slots to provide services (either conforming or non-conforming) to Alaska and Hawaii that are generally comparable in price, quality and content to the services that are available in the mainland.

As explained below, the State believes that these new, more liberal requirements will benefit all U.S. consumers by encouraging expanded use of DBS capacity, particularly the underused western orbital slots, while ensuring that the vast potential consumer benefits of the DBS service are made available to Americans in every state.

## **II. CLARIFICATION OF THE GEOGRAPHIC SERVICE RULES IS ESSENTIAL TO THE PROVISION OF ADEQUATE DBS SERVICE IN HAWAII.**

Clarification and vigorous enforcement of the current geographic service rules embodied in Section 100.53 is essential to the provision of adequate DBS service in Alaska and Hawaii.

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<sup>5</sup> The term “non-full CONUS orbital slot” refers to any DBS orbital slot that does not have direct line of sight with the entire continental (“CONUS”) United States, which presumably would include any satellite at 120° W.L., or west of that position (thus excluding any satellite which may be nominally located at 119.2° W.L.).

<sup>6</sup> The term “full CONUS orbital slot” refers to any DBS orbital slot that does have direct line of sight with CONUS, which presumably would include any satellite located east of 120° W.L.

DBS operators claim that they introduced DBS service in Hawaii last year—18 years after DBS was created and nearly five years after Section 100.53 was adopted. This seeming “victory” for the people of Hawaii is tarnished by the fact that Directv does not appear to be marketing its service in Oahu, the major population center in the State, and the advertised programming packages for Directv and EchoStar are not competitive with local cable television and are not comparable with the DBS programming that is available in the continental United States (“CONUS”). For example, EchoStar’s AT 70 programming package that is advertised in Hawaii costs the same as EchoStar’s AT 100 package that is marketed on the mainland – \$ 29.99 per month, – but the AT 70 package includes less than half the cable television channels as the AT 100 package. Also, Directv’s subscriber package in Hawaii omits many of the most popular channels, including CNN, ESPN and the Weather Channel.

The Cable Television Division of the Hawaii Department of Commerce and Consumer Affairs conducted an informal DBS survey in November 2000. The survey revealed that the national retail chains that Directv is using to market its services on the mainland – such as Radio Shack, Sears and Circuit City – are not marketing Directv’s services in Hawaii. None of the retailers were able to advise the Department regarding a target date for making Directv’s service available and a representative of one of the retailers expressed frustration about the lack of progress. At the same time, some independent retailers of EchoStar’s service reported low demand among consumers because of the lack of programming that is available. These same merchants also complained that both operators’ offerings are not competitive with cable television offerings in Hawaii.<sup>7</sup>

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<sup>7</sup> See Letter to Mr. Donald Abelson from Herbert E. Marks and Bruce A. Olcott, IB Docket 98-21 (Nov. 21, 2000).

As history shows, DBS operators have been unwilling to provide DBS programming to Hawaii that is comparable to that provided in the rest of the United States.<sup>8</sup> This tradition of willful violation of Commission rules and discrimination against the people of Hawaii must not continue. The State of Hawaii believes that Section 100.53 mandates service that is comparable *in terms of quality, price, and content*. This requirement should be expressly codified in the Commission's regulations and should apply to both conforming and non-conforming uses of DBS spectrum.

### **III. ADDITIONAL NON-CONFORMING USE OF DBS SPECTRUM SHOULD BE PERMITTED, BUT ONLY ON A GEOGRAPHICALLY EQUIVALENT BASIS.**

Assuming that the geographic service goals discussed above are not undermined, Hawaii would support liberalization of the Commission's non-conforming use policy in ways that promote increased access to DBS service and encourages innovative uses of the spectrum, while preserving geographic service equality. Under the current rules, licensees must begin actual DBS operations within five years of licensing, but they may make unrestricted use of their assignments prior to the expiration of the initial five-year period.<sup>9</sup> After the initial five-year period, DBS licensees may continue to provide non-DBS services for the duration of the lives of their first satellites, but only on transponders providing DBS services, and, even then, non-DBS use cannot exceed fifty percent of each 24-hour day.<sup>10</sup>

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<sup>8</sup> The current DBS providers have argued that Section 100.53 has no substantive component and that transmission of test patterns would fulfill geographic service obligations. *See, e.g., Opposition and Reply Comments of Directv Enterprises, Inc.*, File No. SAT-LOA-20000505-00086, at 8 (July 17, 2000) (arguing that Directv's geographic service obligations require only that "whatever services are offered from [an orbital] location must be made available to Alaska and Hawaii (to the extent the residents there are legally eligible to receive such services)"); *see also* footnote 4 *supra*.

<sup>9</sup> *See Petition of United States Satellite Broadcasting Company, Inc. for Declaratory Ruling Regarding Permissible Uses of the Direct Broadcast Satellite Service*, 1 FCC Rcd 977, at ¶ 13 (1986); *see also In the Matter of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, at ¶ 17 (1995) ("1995 DBS Order").

<sup>10</sup> *Id.*

The State of Hawaii proposes a two-pronged approach that would encourage more permissive use of DBS spectrum. First, the State favors permitting liberalized non-conforming use of DBS spectrum in the non-full CONUS orbital slots (*i.e.*, 61.5° W.L., 148° W.L., 157° W.L., 166° W.L., and 175° W.L.) because these slots are not fully utilized. Licensees would be permitted to use non-full CONUS orbital slots to provide *any* direct-to-consumer services in unlimited quantity, subject to a stringent geographic service requirement. Specifically, any services (conforming, or non-conforming) that are provided using *western* non-full CONUS DBS orbital slots must be made available to consumers in Alaska and Hawaii at prices and service levels (with respect to quality, reliability, outages, error rates, speed, total bandwidth and quantity of services) that are comparable with the services available to other customers. Providing an equivalent level of service to residents in Alaska and Hawaii should not be a burden since the western slots are all located near the longitude of Hawaii (which is around 155° W.L.).

Allowing expanded non-conforming use of non-full CONUS slots will benefit the entire country by encouraging increased competition and utilization of these orbital slots by attracting applications from non-traditional operators, such as providers of satellite Internet services. A liberalized approach would also be consistent with the original intent of DBS.<sup>11</sup> DBS orbital positions are spaced at intervals of nine degrees to enable reception by very small dishes favored by residential consumers.<sup>12</sup> Limiting permissive use to direct-to-consumer services justifies the spacing rationale of the spectrum.

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<sup>11</sup> See *In the Matter of Policies and Rules for the Direct Broadcast Service*, Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd 6907, at ¶¶ 5-7 (1998). See also 47 C.F.R. 100.3 (defining DBS service as providing direct reception by the general public, encompassing individual reception and community reception).

<sup>12</sup> This is contrasted to the two-degree spacing currently utilized for the Fixed Satellite Service (“FSS”).

The State's proposed non-conforming use policy would also permit DBS operators to use non-full CONUS orbital slots to provide both DBS and non-DBS services to residents of foreign countries, so long as any and all services provided to non-U.S. residents utilizing the western non-full CONUS DBS slots are made equally available<sup>13</sup> in Alaska, Hawaii, and in as much of the continental United States as is technically feasible.<sup>14</sup>

Second, the Commission's new non-conforming use policy should be limited to non-full CONUS orbital slots. The State believes that the current non-conforming use rules should remain intact for satellites in the full-CONUS slots (*i.e.*, 101° W.L., 110° W.L., and 119° W.L.). Limiting flexibility on non-conforming use of full-CONUS slots is essential given the lengthy record of non-performance by providers. DBS licensees using the full-CONUS slots have failed repeatedly to fulfill their public service obligations – such as providing educational and public interest programming to all customers and making available adequate service to the residents of Alaska and Hawaii. Permitting DBS licensees to use full-CONUS slots to provide even less DBS programming would only increase their incentive to evade the Commission's public interest requirements. In contrast, retaining the current non-conforming use rules for the full-CONUS slots will help to ensure that DBS spectrum is used as fundamentally intended: to provide core DBS programming and services to all fifty states.

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<sup>13</sup> By "equally available," the State means that the services must be provided in Alaska and Hawaii at prices and service levels (with respect to quality, reliability, outages, error rates, speed, total bandwidth and quantity of services) that are comparable with the prices and service levels offered to other customers.

<sup>14</sup> By "technically feasible", the State refers to all areas within line of sight of the satellite. Neither the State, nor the Commission, ever intended for the term "technically feasible" to excuse operators that manipulate their satellite designs or program configurations in ways that impair the provision of full DBS service to Hawaii. *See* 1995 DBS Order, at ¶ 128.

**IV. FOREIGN PROVIDERS SHOULD BE PERMITTED TO SERVE U.S. MARKETS, SUBJECT TO THE SAME RULES AS U.S. PROVIDERS.**

The Commission currently permits certain non-U.S. licensed DBS operators to provide services to U.S. residents, subject to the same rules as domestic providers. This policy should be extended to the Commission's new rules on non-conforming DBS spectrum use.<sup>15</sup> Specifically, non-U.S. DBS operators should be permitted to use any western DBS orbital slot (presumably, 120° W.L.,<sup>16</sup> or west thereof) to provide any direct-to-consumer service, as long as the service is equally available (as defined in the previous section) in Alaska and Hawaii. Non-U.S. DBS operators should also be permitted to use full-CONUS slots (presumably east of 120° W.L.) to provide non-conforming DBS services to U.S. consumers subject to the Commission's existing non-conforming use policy, so long as they comply with the Commission's geographic service requirements, as clarified in this proceeding. Providing equivalent treatment for non-U.S. operators will encourage competition while protecting the interests of U.S. consumers.

**V. CONCLUSION**

Since the Commission's creation of the DBS service, the people of the State of Hawaii have been underserved. The DBS situation in Hawaii has always been and is currently unacceptable. Recognizing this shortcoming, the State supports the adoption of a more permissive non-conforming use policy for DBS spectrum in the non-full CONUS orbital positions, subject to a stringent geographic service requirement. The State also believes that

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<sup>15</sup> See *Hawaii NPRM Comments*, at 3-5 (favoring equivalent treatment of non-U.S. DBS operators).

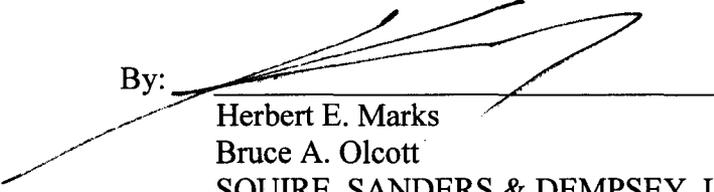
<sup>16</sup> The use of 120° W.L. as a breakpoint is intended to ensure that DBS satellites that are nominally located at 119.2° W.L. are properly treated as full-CONUS orbital slots. For example, utilizing this approach, Mexico's assignments at 126.8° W.L. and 127.2° W.L., along with Canada's assignments at 128.8° W.L. and 129.2° W.L. would, if modified to cover the United States, be treated as western non-full CONUS orbital slots. (The State is unaware of any other DBS orbital assignments in the 120° to 130° range.)

consistent rules should apply across the board and any services provided should be provided in a non-discriminatory manner to all U.S. locations that are within "sight" of the satellite.

Hawaii has been looking forward to DBS service as a means to provide competition to the cable industry and as a means of making available a variety of telecommunications services to the State. The State's experience to date with the provision of DBS has been extremely disappointing. The State asks that the Commission remedy the situation and keep this overt and pervasive discrimination in mind when formulating any modifications to the current regulations.

Respectfully submitted,

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