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SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

December 21, 2001

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: Permitted Oral Ex Parte Presentation
IB Docket No. 98-21

Dear Secretary Salas:

On December 20, 2001, Herbert E. Marks and Bruce A. Olcott of Squire Sanders & Dempsey, as counsel for the State of Hawaii, met with Commissioner Kevin Martin, along with Monica Shah Desai, his Legal Advisor for Wireless and International Issues and Catherine Crutcher Bohigian, his Legal Advisor on Cable and Mass Media Issues. Later in the day, a meeting was also held with Peter Tenhula, Senior Legal Advisor for Chairman Michael Powell.

During the discussion, Marks and Olcott reiterated the position of the State of Hawaii that the Commission's geographic service rules, 47 C.F.R. § 100.53, already mandate that direct broadcast satellite ("DBS") licensees must provide service to Hawaii that is generally "comparable" with the programming packages that are provided in the rest of the United States. Marks and Olcott indicated that DBS licensees have failed to meet this standard and at least one of the current DBS licensees has provided no indication that it will attempt to meet this standard in the foreseeable future. The Commission was urged to address discrimination by DBS licensees against the residents of Hawaii in its Part 100 Order on the DBS service.

The attached materials were distributed during the meeting. Please contact the undersigned if you have any questions.

Sincerely,

Bruce A. Olcott

Copy: Commissioner Kevin Martin
Monica Shah Desai, Legal Advisor for Wireless and International Issues
Catherine Crutcher Bohigian, Legal Advisor on Cable and Mass Media Issues
Peter Tenhula, Senior Legal Advisor for Chairman Michael Powell
Linda Haller, Legal Advisor, International Bureau
Christopher Murphy, Legal Advisory, International Bureau
Rosalee Chiara, Deputy Chief, Satellite Policy Branch

Direct Broadcast Satellite Service for Hawaii

Ex Parte Presentation by The State of Hawaii in IB Docket No. 98-21

December 20, 2001

- The Commission adopted geographic service rules in 1995 mandating service to Hawaii and Alaska in recognition that these States have been subject to discriminatory treatment.
  - DBS orbital assignments are an important public resource because they can further "the statutory goal of providing equitable distribution of service throughout the nation" and can provide competitive choice with monopolistic cable television operators.
  - Additionally, the availability of DBS service can aid in the social, economic and technological integration of Alaska and Hawaii with other regions of the United States.
- The Commission should not retreat from its support for consumers in Hawaii and Alaska. Instead, it should reaffirm in its Part 100 Order that DBS licensees have an obligation to provide service to the States that is comparable to the services available in the mainland.
  - The FCC adopted geographic service rules <u>not</u> just to ensure that all states receive <u>some</u> DBS service, but also due to concern about the "extent of DBS service to Alaska and Hawaii" and the possibility that the States would never be "adequately served."
  - The Commission indicated that its geographic service rules require the provision of "full service" to Alaska and Hawaii, noting that a licensee's failure to provide "full service" would be a "violation of our regulations."
- While the Commission's actions have generated some progress, the DBS offerings in the State are still not comparable with the programming that is available in the rest of the country and is not competitive with cable television services in Hawaii.
  - While Directv's Hawaii Choice package includes about 44 channels of cable programming for $21.99, the package lacks most of the more popular and informative programming available, such as CNN, Headline News, The Weather Channel, Discovery Channel, ESPN, ESPN 2, TBS, TNT and USA Network. It also lacks programming that is distributed exclusively by Directv, such as NFL Sunday Ticket. It does not appear to be even colorably competitive with terrestrial cable services in Hawaii.
  - While Echostar has made better progress, there are still shortcomings with its service to the State. Retailers report that there is a substantial demand among Hawaiians for EchoStar's heavily promoted America's Top 150 package. Unfortunately, the AT 150 package is not marketed in Hawaii and can be received in Hawaii only by purchasing two satellite dishes, which could double the equipment and installation costs.

- DBS Licensees have argued that the State is urging the FCC to regulate content on a program-by-program basis.
  - In reality, the State is not seeking identical programming, but instead comparable program packaging.
  - The DBS licensees provide identical program packages – such as "Total Choice" and "America's Top 150" – in 48 states, but not in Hawaii. Such disparate treatment is not about content, but about targeted discrimination.
- Directv has also argued that it can "balance" its compliance with the geographic service rules against other regulatory goals and obligations, such as adding local-into-local and educational programming services.
  - The Commission has already concluded, however, that "Directv's decision to provide local-into-local service does not excuse Directv from its service obligations to Hawaii."
  - The Commission has also concluded that, in passing the 1992 Cable Act, Congress intended for non-commercial programming to be offered "to all of a DBS provider's subscribers" and cannot exclude "subscribers . . . in Alaska or Hawaii."
- Directv also argues that its goals of providing service to Alaska and Hawaii can be balanced against its goals of offering high-definition and advanced service capabilities, along with providing service to ethnic and underserved constituencies.
  - Consumers in Alaska and Hawaii are clearly one of the *underserved* constituencies that must be served by Directv.
  - Furthermore, consumers in Alaska and Hawaii deserve access to high-definition and advanced services just as much as consumers in the rest of the United States.
- Finally, Directv argues that it would be too difficult to adjust its network to provide full service to Hawaii, in some cases requiring double illumination of programming.
  - Directv has persistently implemented business and system configuration decisions in blatant and knowing disregard of the Commission's geographic service rules. Directv should not now be permitted to claim that its failure to comply with the rules in the past should provide it with an excuse for its failure to comply in the future.
  - In any event, it would not be difficult for Directv to provide full programming to Hawaii. Directv would simply need to move popular programming from old satellites to new satellites, all at the same orbital position, without adjusting any consumer receivers.