

January 11, 2002

Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: DBS Service to Hawaii; IB Docket No. 98-21

Dear Commissioner Martin:

As you requested during our meeting on December 20, 2001, please find attached two charts that provide comparisons regarding Direct Broadcast Satellite (“DBS”) service in Hawaii. The charts provide a comparison of the programming packages that the DBS licensees provide in the mainland with the packages that are made available in Hawaii. The charts demonstrate that the DBS subscriber packages that are currently marketed in Hawaii are not comparable to the subscriber packages that are available in the 48 mainland states.

The first chart provides a comparison between Directv’s Total Choice package, its major service offering to consumers in the mainland 48 states, and the two subscriber packages that Directv makes available in Hawaii. DirecTV’s Total Choice package includes 78 cable programming channels for \$31.99 per month. In Hawaii, Directv offers Hawaii Choice Plus, which includes just 47 cable programming channels at \$29.99 per month, and Opcion Hawaii Plus, which includes 19 Spanish language channels at \$23.99 per month.

The differences between Directv’s Total Choice package and the two Hawaiian packages are significant. Not available under either of the Hawaii packages are 44 programming channels, including such popular options as A&E Network, BET, Bloomberg Television, CNBC, CNN, CNN/Sports Illustrated, C-SPAN, all of the Discovery channels, ESPN, ESPN2, Headline News, The Health Network, TBS Superstation, Turner Classic Movies, USA Network, The Weather Channel, and WGN Superstation. In order to make up for the unavailability of these 44 channels, DirecTV offers 13 less popular channels in the Hawaii Choice Plus package and 19 Spanish-language channels in the Opcion Hawaii Plus package.

The second chart compares EchoStar’s America’s Top 150 package (“AT 150”), which is marketed only in the mainland 48 states, with EchoStar’s America’s Top 100 package (“AT 100”), which is marketed in both the mainland and in Hawaii. Because EchoStar customers in Hawaii are not offered EchoStar’s popular AT 150 package, they do not receive 33 programming channels, including such channels as Biography, Bloomberg Television, CNN/Sports Illustrated,

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several Discovery channels, several Encore movie channels, FOX Movie Channel, FOX Sports World, Golf Channel, Hallmark Channel, Outdoor Channel, Outdoor Life, SoapNet, Style and VH1 Classic.

In summary, the current DBS licensees continue to provide inadequate and discriminatory service to the State, despite Commission rules mandating that DBS licensees must provide service to Hawaii that is generally comparable in content and quality to DBS service in the rest of the United States.¹ When making these rules in 1995, the Commission made clear that provision of full service to Alaska and Hawaii is required and that a licensee's failure to provide such full service would be a violation of Commission regulations.² The regulatory focus of the rule is *fairness*. Fairness in the context of DBS services includes at least comparable and non-discriminatory service to all states.

Congress also has made clear that service equity is a priority. For example, Section 151 of the Communications Act charges the Commission with ensuring citizens "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."³ Section 307 (b) directs the Commission to develop rules with the goal of providing "a fair, efficient, and equitable distribution of radio service" to all states.⁴

Importantly, the State is not requesting that DBS service in Hawaii be identical to the programming that is provided in other parts of the United States. The State simply believes that if a DBS operator markets the same subscriber packages in 48 mainland states, then the operator should also make those packages available in the remaining two states. The State's requested relief requires the least intervention by the FCC. The Commission need only mandate that the providers offer Hawaiians the same national programming packages that they offer to customers in every one of the 48 mainland states. Such an approach does not dictate what channels the provider should select for its national programming packages. The State's requested relief also releases the Commission from having to condone the claim of DBS licensees that the overtly discriminatory structure of their programming packages is somehow consistent with the public interest.

In resisting the Commission's regulations, Directv has argued that the State is misinterpreting the DBS geographic service requirements. Directv argues that the rule gives DBS licensees "flexibility" to avoid the provision of comparable service to Hawaii.⁵ Directv

¹ See 47 C.F.R. § 100.53.

² See *In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, IB Docket No. 95-168, PP Docket No. 93-253, 11 FCC Rcd 9712, 9761 (1995).

³ See 47 U.S.C. § 151.

⁴ See 47 U.S.C. § 307 (b).

⁵ See *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, Directv Ex Parte, IB Docket No. 98-21 at 3 (filed July 20, 2001) ("*Directv Ex Parte*").

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has apparently exercised this “flexibility” in two major ways. First, it has persistently implemented business and system configuration decisions in blatant and knowing disregard of the Commission’s geographic service rules. Then, it has hidden behind such false pretexts and notified the Commission that it is providing service to Hawaii to the best of its ability.

Second, Directv uses other public interest objectives such as the provision of public interest and local broadcasting and advanced services as an excuse and as a shield to perpetuate inferior service to Hawaii. Directv has argued in other proceedings that its compliance with Section 100.53 is discretionary and can be balanced against other goals.⁶ It claims that service to Hawaii is justifiably compromised when balancing all of its competing public interest obligations.

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.”⁷ For example, the Commission has already concluded that 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.”⁸ In fact, nowhere does the Commission’s rules permit violation of Section 100.53 in the interest of meeting any other public interest objective.

The State strongly urges the Commission to promptly address the issue of ongoing discrimination by DBS licensees against residents in Hawaii in its upcoming Part 100 Order on DBS. The Commission has been considering the docket for over three years without resolution. Because of the lapse in time, the Commission needed to refresh the record, thus exacerbating the regulatory delay.⁹

Hawaii does not request “drastic marketplace intervention” as Directv would have the Commission believe.¹⁰ Rather, the State asks that the Commission merely *reiterate* and *enforce* its current rules. That the DBS licensees may be inconvenienced by the adjustments they will need to make in order to comply with those rules should not be a deterrent to the necessary Commission action. The simple truth is that the DBS licensees have created their own technical and satellite system configuration problems by repeatedly failing to give Commission regulations proper consideration.

⁶ See *In the Matter of Directv Enterprises, Inc. for Authority to Launch and Operate DIRECTV 4S (USABBS-13)*, Opposition of Directv, File No. S2430 SAT-LOA-20010518-00045 (Aug. 10, 2001).

⁷ *In the Matter of Directv Enterprises Inc. for Authority to Launch and Operate a Direct Broadcast Satellite Service Space Station*, DA 01-2402, ¶ 12 (Oct. 26, 2001).

⁸ See *In the Matter of American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, FCC 99-367, ¶¶ 10, 12 (Nov. 24, 1999) (concluding that EchoStar cannot provide all of its non-commercial programming solely to subscribers in the eastern United States using its orbital assignment at 61.5° W.L.).

⁹ See *The Commission Requests Further Comment in Part 100 Rulemaking Proceeding on Non-Conforming Use of Direct Broadcast Satellite Service Spectrum*, Public Notice, IB Docket No. 98-21 (rel. Dec. 8, 2000).

¹⁰ See *Id.* at 1.

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Further, Directv exaggerates the efforts necessary to provide comparable service to Hawaii. It is possible for the DBS licensees to provide comparable service to Hawaii *without* repositioning satellites, *without* the need to alter every consumer receiver dish, *without* "double illumination" of Hawaii and the continental United States, and *without* substantial cost. Comparable service to Hawaii could be achieved simply by transitioning services provided to Hawaii from older satellites to newer ones. The two operators will make these improvements, however, only if the Commission makes clear that DBS licensees have an affirmative obligation to provide service that is uniformly comparable throughout the United States.

Sincerely,



Herbert E. Marks

Bruce A. Olcott

Counsel to the State of Hawaii

Attachments

cc: Chairman Michael Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Monica Shah Desai, Legal Advisor to Commissioner Martin
Catherine Crutcher Bohigian, Legal Advisor to Commissioner Martin
Peter Tenhula, Senior Legal Advisor for Chairman Michael Powell
Paul Margie, Legal Advisor to Commissioner Copps
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Linda Haller, Legal Advisor, International Bureau
Christopher Murphy, Legal Advisory, International Bureau
Rosalee Chiara, Deputy Chief, Satellite Policy Branch
Secretary Magalie Roman Salas

CHART 1

DirecTV: Total Choice Package Comparison with Hawaii Program Offerings

- Total Choice Package is the basic channel-programming package available from DirecTV for \$31.99/month for 78 basic channels. An additional 31 music channels and as many as 55 PPV channels for movies and events are accessible. Separate add-on packages for premium movie channels, such as from the HBO family of channels, are available at additional monthly cost that varies by the movie channel provider. These 30 premium movie channels are available as part of the Total Choice Platinum package for \$69.99/month.
- Two packages are available for subscribers in Hawaii: (1) Hawaii Choice Plus at \$21.99/month and Opción Hawaii Plus (same channel lineup as Hawaii Choice Plus with an additional 19 Spanish-language channels) at \$23.99/month. Both Hawaii packages provide 47 basic channels.
- Program charts as of December 26, 2001 and downloaded from DirecTV at <http://www.directv.com/packages/packagespages/0,1336,516,00.html>
- Any music channels, PPV movie, duplicative regional channel and programming guides are not included in this comparison.

Total Choice Package, \$31.99/month	Hawaii Choice, Plus \$21.99/month	Opción Hawaii Plus, \$23.99/month
A&E Network	<i>NO</i>	<i>NO</i>
All News Channel	<i>NO</i>	<i>NO</i>
American Movie Classics (AMC)	X	X
Animal Planet	X	X
BBC America	<i>NO</i>	<i>NO</i>
Black Entertainment Television (BET)	<i>NO</i>	<i>NO</i>
Bloomberg Television	<i>NO</i>	<i>NO</i>
Bravo	X	X
Cartoon Network	<i>NO</i>	<i>NO</i>
CNBC	<i>NO</i>	<i>NO</i>
CNN	<i>NO</i>	<i>NO</i>
CNNfn/CNN International	<i>NO</i>	<i>NO</i>
CNN/Sports Illustrated	<i>NO</i>	<i>NO</i>
Comedy Central	X	X
Country Music Television (CMT)	<i>NO</i>	<i>NO</i>

Court TV	X	X
C-SPAN	NO	NO
C-SPAN2	X	X
Discovery Channel	NO	NO
Discovery Health Channel	NO	NO
Disney Channel (West)	X	X
E! Entertainment Television	X	X
ESPN	NO	NO
ESPN2	NO	NO
ESPNEWS	NO	NO
ESPN Classic	NO	NO
Food Network	X	X
FOX Family Channel	NO	NO
FOX Movie Channel	X	X
FOX News Channel	X	X
FX	X	X
Galavision	X	X
Game Show Network	NO	NO
Hallmark Channel	NO	NO
Headline News	NO	NO
The Health Network	NO	NO
The History Channel	X	X
Home & Garden Television (HGTV)	X	X
Home Shopping Network	X	X
Independent Film Channel (IFC)	NO	NO
The Learning Channel (TLC)	X	X
Lifetime	X	X
Lifetime Movie Network	NO	NO

MSNBC	X	X
MTV	X	X
MTV2	X	X
MuchMusic	NO	NO
National Geographic Channel	NO	NO
The National Network	NO	NO
Newsworld International	NO	NO
Nickelodeon/Nick at Nite (West)	X	X
Noggin	X	X
Outdoor Life Network	NO	NO
Oxygen	X	X
PAX	X	X
PBS YOU	NO	NO
QVC	X	X
Regional Sports Network (in-market)	X	X
SCI FI Channel	X	X
ShopNBC	NO	NO
Speedvision	X	X
TBS Superstation	NO	NO
TechTV	NO	NO
TNT	NO	NO
Toon Disney	X	X
Travel Channel	X	X
Trinity Broadcasting Network (TBN)	NO	NO
TRIO	NO	NO
Turner Classic Movies (TCM)	NO	NO
TV Land	X	X
Univision	X	X

USA Network	<i>NO</i>	<i>NO</i>
VH1	X	X
WE: Women's Entertainment	<i>NO</i>	<i>NO</i>
The Weather Channel	<i>NO</i>	<i>NO</i>
WGN Superstation	<i>NO</i>	<i>NO</i>
Word Network	<i>NO</i>	<i>NO</i>
WorldLink TV	<i>NO</i>	<i>NO</i>

- Hawaii Choice Plus subscribers can access 13 other channels not available in the Total Choice package for mainland US:
 - Biography
 - Bomerang
 - Discovery Kids
 - Do-It-Yourself Network
 - Galavision
 - Golf Channel
 - Odyssey
 - PBS Kids
 - Soapnet
 - STARZ! Theater East
 - STARZ! West
 - Univision
 - ValueVision
- The Opción Hawaii Plus package also provides an additional 19 Spanish-language channels in Hawaii (not listed above), which are not available in the Total Choice package for mainland US without an additional charge.
- No local channels are available under any of DirecTV's offerings, whether in the mainland United States or Hawaii, without additional charge.
- There are also up to 19 premium movie channels available to Hawaii subscribers from HBO and Showtime on an à la carte basis.
- DirecTV's stand-alone sports packages (i.e., NBA, MLB, NFL, etc.) are not available in Hawaii.

CHART 2

America's Top 150 (as available in mainland US at \$39.99/month)

- Comparison between America's Top (AT) 150 (available only in mainland United States) and AT 100 (as available in mainland US and available in Hawaii).
- AT 150 offers 129 basic channels. AT 100 offers 96 basic channels. Music channels and PPV movie channels are also accessible. Neither package includes any local channels.
- Programming lineups as of December 26, 2001 downloaded from EchoStar promotional website at <http://www.dishnetwork.com/content/programming/packages/index.shtml>
- Music channels, PPV movie, and multiple regional sports network available depending on the subscriber's location, duplicative regional channels, and programming guides are deleted from the comparison.

AT 150 CHANNEL	CATEGORY	AVAIL AT 100	NETWORK	AT 150 CHANNEL	AVAIL AT 100
<u>America's Collectibles Network</u>	SHOPPING	X	<u>American Movie Classics</u>	MOVIES	X
<u>Angel One (Sky Angel 100 Ministries)</u>	FAMILY	X	<u>Animal Planet</u>	LEARNING	X
			<u>Arts & Entertainment</u>	VARIETY	X
<u>BBC America</u>	VARIETY	X	<u>BYUTV</u>	LEARNING	X
<u>Beauty & Fashion Channel</u>	SHOPPING	X	<u>Biography</u>	INFORMATIONAL	NO
<u>Black Entertainment Television</u>	VARIETY	X	<u>Bloomberg</u>	NEWS	NO
<u>Boomerang</u>	FAMILY	NO	<u>Bravo</u>	MOVIES	X
<u>C-SPAN</u>	NEWS/INFO	X	<u>C-SPAN2</u>	NEWS/INFO	X
<u>CNBC</u>	NEWS/INFO	X	<u>CNN Financial/CNN International</u>	NEWS/INFO	X
<u>CNN/Sports Illustrated</u>	SPORTS	NO	<u>Cable News Network</u>	NEWS/INFO	X
<u>California Community Colleges Satellite Network</u>	EDUCATION AL	X	<u>Cartoon Network, The</u>	FAMILY	X
<u>ComCast SportsNet</u>	SPORTS	X	<u>Comedy Central</u>	VARIETY	X
<u>Country Music Television</u>	MUSIC	X	<u>Court TV</u>	NEWS/INFO	X
<u>DELL</u>	LEARNING	X	<u>Discovery Channel, The</u>	LEARNING	X
<u>Discovery Civilization</u>	LEARNING	NO	<u>Discovery Health</u>	LEARNING	X

<u>Discovery Home & Leisure</u>	LEARNING	NO	<u>Discovery Kids</u>	FAMILY	NO
<u>Discovery Science</u>	LEARNING	NO	<u>Discovery Wings</u>	SPORTS	NO
<u>Disney Channel (West)</u>	FAMILY	X	<u>Do It Yourself (DIY)</u>	LEARNING	NO
<u>E! Entertainment Television</u>	VARIETY	X	<u>ESPN</u>	SPORTS	X
<u>ESPN Alternate</u>	SPORTS	X	<u>ESPN Classic</u>	SPORTS	X
<u>ESPN2</u>	SPORTS	X	<u>ESPN2 Alternate</u>	SPORTS	X
<u>ESPNEWS</u>	SPORTS	X	<u>Empire Sports</u>	SPORTS	X
<u>Encore (West)</u>	MOVIES	NO	<u>Encore Action/Adventure</u>	MOVIES	NO
<u>Encore Love Stories</u>	MOVIES	NO	<u>Encore Mysteries</u>	MOVIES	NO
<u>Encore True Stories</u>	MOVIES	NO	<u>Encore WAM/America's Kidz Network</u>	FAMILY	NO
<u>Encore Westerns</u>	MOVIES	NO	<u>Eternal Word Television Network</u>	FAMILY	X
<u>F/X</u>	VARIETY	X	<u>FOX Family Channel</u>	FAMILY	X
<u>FOX Movie Channel</u>	MOVIES	NO	<u>FOX News Channel</u>	NEWS/INFO	X
<u>FOX Regional Sports Network</u>	SPORTS	X	<u>Food Network</u>	LEARNING	X
<u>FOX Sports World</u>	SPORTS	NO	<u>Free Speech TV</u>	LEARNING	X
<u>Galavision</u>	SPANISH	X	<u>Game Show Network</u>	VARIETY	X
<u>Golf Channel, The</u>	SPORTS	NO	<u>Great American Country</u>	MUSIC	NO
<u>HITN</u>	LEARNING	X	<u>Hallmark Channel</u>	FAMILY	NO
<u>Headline News Network</u>	NEWS/INFO	X	<u>History Channel International</u>	LEARNING	NO
<u>History Channel, The</u>	LEARNING	X	<u>Home & Garden Television</u>	LEARNING	X
<u>Home Shopping Network, The</u>	VARIETY	X	<u>ISHOP</u>	SHOPPING	X
<u>Lifetime</u>	FAMILY	X	<u>Lifetime Movie Network</u>	MOVIES	X
<u>LinkMedia</u>	LEARNING	X	<u>MSNBC</u>	NEWS/INFO	X
<u>Madison Square Garden</u>	SPORTS	X	<u>Men's Channel</u>	SHOPPING	X
<u>Movie Channel, The (West)</u>	MOVIES	NO	<u>Music Television</u>	MUSIC	X
<u>Music Television 2</u>	MUSIC	X	<u>NASA</u>	NEWS/INFO	X

<u>Nickelodeon / Nick at Nite (West)</u>	FAMILY	X	<u>Nickelodeon Games & Sports</u>	FAMILY	NO
<u>Noggin</u>	FAMILY	X	<u>Northern Arizona University / University House</u>	LEARNING	X
<u>Outdoor Channel, The</u>	SPORTS	NO	<u>Outdoor Life</u>	SPORTS	NO
<u>PAX TV</u>	FAMILY	X	<u>PBS YOU</u>	LEARNING	X
<u>QVC Shopping Network</u>	VARIETY	X	<u>RFDTV</u>	INFORMATIONAL	X
<u>Research Channel</u>	EVENTS	X	<u>Romance Classics / Independent Film Channel</u>	MOVIES	X
<u>Sci-Fi Channel, The</u>	FAMILY	X	<u>Shop At Home</u>	SHOPPING	X
<u>SoapNet</u>	FAMILY	NO	<u>Speedvision</u>	SPORTS	NO
<u>Sports Alternate 1</u>	SPORTS	X	<u>Sports Alternate 2</u>	SPORTS	X
<u>Sports Alternate 3</u>	SPORTS	X	<u>Style</u>	VARIETY	NO
<u>Sunshine Network</u>	SPORTS	X	<u>TMC XTRA West</u>	MOVIES	NO
<u>TV Games Network</u>	SPORTS	X	<u>TV Land</u>	VARIETY	X
<u>TechTV</u>	LEARNING	X	<u>The Learning Channel</u>	LEARNING	X
<u>The National Network</u>	VARIETY	X	<u>Toon Disney</u>	FAMILY	X
<u>Travel Channel, The</u>	LEARNING	X	<u>Trinity Broadcasting Network</u>	FAMILY	X
<u>Turner Broadcast System</u>	VARIETY	X	<u>Turner Classic Movies</u>	MOVIES	X
<u>Turner Network Television</u>	VARIETY	X	<u>Turner South</u>	SPORTS	X
<u>USA Network</u>	VARIETY	X	<u>University of California</u>	LEARNING	X
<u>University of Washington TV</u>	EDUCATION AL	X	<u>Univision</u>	SPANISH	X
<u>VH1</u>	MUSIC	X	<u>VH1 Classic</u>	MUSIC	NO
<u>ValueVision</u>	SHOPPING	X	<u>WGN</u>	VARIETY	X
<u>Weather Channel, The</u>	NEWS/INFO	X	<u>Wisdom Television</u>	VARIETY	NO
<u>Good Samaritan Network</u>	LEARNING	X	<u>ISHOP</u>	SHOPPING	X
<u>Panhandle Area Educational Consortium</u>	EDUCATION AL	X	<u>Shop At Home</u>	SHOPPING	X

- Summary -- AT 150 Channels not available on AT 100 (33 channels):
 - Biography
 - Bloomberg
 - Boomerang
 - CNN/Sports Illustrated
 - Discovery Civilization
 - Discovery Home & Leisure
 - Discovery Kids
 - Discovery Science
 - Do It Yourself (DIY)
 - Encore (West)
 - Encore Action/Adventure
 - Encore Love Stories
 - Encore Mysteries
 - Encore True Stories
 - Encore WAM/America's Kidz Network
 - Encore Westerns
 - FOX Movie Channel
 - FOX Sports World
 - The Golf Channel
 - Great American Country
 - Hallmark Channel
 - History Channel International
 - The Movie Channel (West)
 - Nickelodeon Games & Sports
 - The Outdoor Channel
 - Outdoor Life
 - SoapNet
 - Speedvision
 - Style
 - TMC XTRA West
 - VHI Classic
 - Wisdom Television

- America's Everything Pak (available in mainland US at \$69.99/month; not available in Hawaii) includes:
 - America's Top 150 and all four premium movie packages (SHOWTIME UNLIMITED, HBO The Works, Multimax from Cinemax, and Starz Encore Super Pak) of 29 channels`