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

In the Matter of	)	
	)	
Request For Comment On Petitions Regarding Directv's DBS Service to the States Of Alaska And Hawaii	)))	Media Bureau Docket No. 03-82

COMMENTS OF
THE STATE OF HAWAII

The State of Hawaii ("the State")[1] appreciates the Commission's continued efforts to bring the benefits of competitive direct broadcast satellite ("DBS") service to consumers in Alaska and Hawaii. Last year, the Commission clarified its geographic service rules to "enhance the delivery of DBS service" to residents in the two states.[2] In doing so, the Commission reaffirmed "the importance of establishing DBS as a competitor to cable in the MVPD market in the States of Alaska and Hawaii."[3]

The Commission also stated it plans "to continue to work with DBS operators, particularly with Directv, and the States to ensure that DBS licensees provide the service required under our rules."[4] It was hoped that the DBS providers, particularly Directv, would

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[1] The State herein comments through the Hawaii Department of Commerce and Consumer Affairs ("the Department"). A division of the Department – the Cable Television Division – is the State's cable franchise administrator.

[2] *See Policies and Rules for the Direct Broadcast Satellite Service*, FCC 02-110, ¶¶ 2 (June 13, 2002) ("*DBS Order*").

[3] *Id.* ¶ 50.

[4] *Id.* ¶ 53.

understand the Commission's mandate. This did not happen, however. Therefore, consistent with its order, the Commission opened this docket to address complaints against Directv and to develop a full and complete record on the matter.[5]

The State acknowledges the necessity of preparing a complete administrative record prior to taking formal action against Directv for violating the Commission's geographic service rules. This examination, however, should be limited to an investigation into the current operating practices of Directv, and should not include a reevaluation of the scope or intent of the Commission's geographic service requirements. The Commission's geographic service rules have existed since 1995.[6] The Commission's subsequent efforts to clarify its rules took more than four years to complete.[7] The final product was a detailed Report and Order that is comprehensive, if not exhaustive. The Commission addressed every aspect of the issue, leaving no legitimate uncertainty for DBS licensees.

For example, on the issue of programming, the Commission clarified that, to the extent that it is technically feasible, a DBS licensee will be in compliance with its geographic service obligations "only if it offers packages of services in Alaska and Hawaii that are reasonably comparable to what the provider offers in the contiguous 48 states."[8] The Commission further

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[5] *See* Public Notice, *Media Bureau Action, Request For Comment On Petitions Regarding Directv's DBS Service to the States Of Alaska And Hawaii*, DA 03-862, at 1 (March 25, 2003).

[6] *See Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995).

[7] *See Policies and Rules for the Direct Broadcast Satellite Service,* Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd 6907 (1998).

[8] *DBS Order* ¶ 72. Commissioner Michael Copps further clarified this requirement, observing that "[b]y packages of services, we refer to all offerings of programming to customers, including the base-programming offering." *Id.*, Separate Statement of Commissioner Michael J. Copps Dissenting in Part, Approving in Part, at 1.

clarified that, based on the substantial evidence in the record, "neither DBS provider offers a package of services to Alaska and Hawaii comparable to what the provider offers to CONUS."[9]

On the issue of consumer reception equipment, the Commission refrained from mandating minimum antenna sizes for DBS services in Alaska and Hawaii.[10] The Commission affirmed, however, that consumer reception equipment is relevant to its geographic service rules, stating that it "strongly encourage[s] DBS operators to provide comparable DBS service to Alaska and Hawaii in terms of receive earth station antenna size with the rest of the contiguous United States, to the extent technically feasible."[11]

Finally, on the issue of enforcement, the Commission provided DBS licensees with ample time to come into compliance with its clarified requirements. The Commission provided that "DBS providers will not be subject to liability in any possible enforcement action until 60 days after [the DBS Order is] published in the Federal Register."[12] This lenient transition period supplemented more than a decade of warnings by the Commission that it is "determined to ensure that DBS service is provided throughout the country, <u>including Alaska and Hawaii</u>."[13]

When these findings are applied to Directv, no ambiguity results. Directv has made no perceptible improvement in the programming that it provides to Hawaii since the Commission concluded last year that Directv's Hawaii programming packages were not comparable to its

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[9] *Id.* ¶ 70.

[10] *See id.* ¶¶ 66-69.

[11] *Id.* ¶ 68.

[12] *Id.* ¶ 72 n.254.

[13] *See Direct Broadcast Satellite Service,* 6 FCC Rcd 2581, 2582 (1991) (*emphasis added*); *see also Direct Broadcast Satellites,* 90 FCC 2d 676, 680 (1982) (*citing 47 U.S.C. § 307*(b)) (stating that the Commission was creating the DBS service in order to advance its statutory goal of "providing equitable distribution of service throughout the nation").

programming offering in CONUS.[14] Directv offers almost none of the most popular and sought after cable programming channels to consumers in Hawaii,[15] channels that Directv has described as "critically important to DBS firms in offering a viable alternative to cable providers."[16]

With respect to consumer reception equipment, Directv does not make available to consumers in Hawaii any reception equipment for its service, regardless of the antenna size.[17] This is in direct conflict with Directv's claim that it was providing DBS service to consumers in Hawaii using 18-inch circular and 29-inch oval antennas.[18] It is also inapposite with the Commission's statement that it "expect[s] that DBS operators will offer the same level of service to customers throughout all fifty states."[19]

Directv's violations of the Commission's geographic service rules cannot be diminished through claims of technical or economic infeasibility. With respect to programming, the fact that Directv is transmitting any programming, albeit less desirable programming, to Hawaii demonstrates that its satellite fleet is technically capable of providing service to the State. With respect to consumer reception equipment, almost all of Directv's major retail distributors operate well-stocked stores in Hawaii, and Directv's competitor, Echostar, has been able to distribute its consumer reception equipment in the State. Thus, no legitimate question exists regarding the

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[14] *SeeDBS Order* ¶ 70.

[15] *See Petition for Administrative Sanctions of the State of Hawaii*, MB Docket No. 03-82, at 7 (Feb. 6, 2003) ("*Hawaii Petition*").

[16] *Reply Comments of Directv, Inc.*, CS Docket No. 01-290, at 7-8 (Jan. 7, 2002) (*quoting* J. Orszag, P. Orszag and J Gale, "A*n Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers*," Jan. 2002, included as an attachment to *Reply Comments of Directv*).

[17] *See Hawaii Petition* at 4-5.

[18] *See DBS Order* ¶ 69 n.249.

[19] *Id.* ¶ 65.

technical or economic feasibility of forcing Directv to come into compliance with the Commission's rules.

Instead, an overwhelming case exists that Directv is in willful and continuous violation of the Commission's geographic service rules and immediate Commission action is justified. The State's residents have waited nearly a decade for Directv to expand its DBS service to Hawaii. The Commission should therefore act swiftly in this proceeding in order to hasten Directv's introduction of competitive DBS services to consumers in all fifty states.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the State of Hawaii in MB Docket No. 03-82 were served this 24th day of April 2003 by U.S. mail to the following:

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