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EX PARTE OR LATE FILED

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

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| In the Matter of |) | |
| |) | |
| Petitions Regarding DIRECTV's DBS |) | MB Docket No. 03-82 |
| Service to the States of Alaska and Hawaii |) | IB Docket No. 98-21 |

EX PARTE RESPONSE OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") submits this *ex parte* submission to respond further to the allegations raised in comments and *ex parte* filings in the above-captioned proceeding.

DIRECTV also presents additional detail regarding DIRECTV's action plan to improve service to Hawaiian consumers.

I. DIRECTV IS IN COMPLIANCE WITH THE COMMISSION'S GEOGRAPHIC SERVICE RULES

Contrary to the assertions of the State of Hawaii ("Hawaii"), the National Rural Telecommunications Cooperative ("NRTC"), and EchoStar Satellite Corporation ("EchoStar"), DIRECTV is in compliance with the Commission's DBS geographic service rules. As recently as 1999, DIRECTV was unable to provide *any* services to Hawaii. Today, DIRECTV provides various packages containing more than 120 programming channels to the islands. Thus, in compliance with the Commission's rules, DIRECTV currently "provide[s] DBS service to . . . Hawaii" from the "authorized orbital locations" where it is technically feasible to do so.¹ In recognition of the fact that DIRECTV currently provides fewer channels to Hawaii as compared to its CONUS subscribers, and to meet the Commission's requirement, stated in the *DBS Rules*

¹ 47 C.F.R. § 25.148(c).

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Order, that Hawaii service be “reasonably comparable,”² DIRECTV has developed specially tailored packages for Hawaiian residents. For example, DIRECTV includes in its Hawaii Choice Plus package two premium movie channels at no additional charge, and discounts all additional premium movie channels by approximately 30 percent compared to the CONUS prices.

Hawaii now incorrectly alleges that DIRECTV has invited the Commission to conduct a “program-by-program content comparison” of its Hawaii service packages.³ To the contrary, DIRECTV has acknowledged that its service to Hawaii is not identical to its CONUS offerings when considered on a program-by-program basis. However, although DIRECTV is unable to provide identical service to the islands, it has nevertheless gone to great lengths to create comparable service offerings, and to enhance its Hawaii programming packages through the inclusion and discounting of certain premium channels. DIRECTV thus offers a “reasonably comparable” service to Hawaii in compliance with the Commission’s rules.⁴

Hawaii also misapplies the Commission’s rules when it suggests that DIRECTV was required to invoke the Commission’s exception for infeasibility due to the provision of non-identical service to Hawaii.⁵ The Commission’s rules do not require that DIRECTV provide Hawaii with identical service and, therefore, do not require that DIRECTV demonstrate technical infeasibility for not providing identical service to Hawaii.⁶ *All* of the programming that is carried on DIRECTV satellites technically capable of “seeing” Hawaii is offered to Hawaiian customers

² Response of the State of Hawaii at 7.

³ *Id.* at 4.

⁴ *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, ¶ 72 (2002) (requiring DBS providers to offer reasonably comparable service to Alaska and Hawaii as that offered in CONUS) (“*DBS Rules Order*”).

⁵ Response of the State of Hawaii at 7.

⁶ 47 C.F.R. § 25.148(c).

from DIRECTV's authorized orbital locations, as the Commission's rules require. Furthermore, as set forth in Section III below, DIRECTV is embarking on a series of measures to improve its service to Hawaii even further.

II. NRTC HAS NO STANDING IN THIS PROCEEDING AND ITS EFFORTS TO MICROMANAGE DIRECTV'S PROGRAMMING AND FLEET MANAGEMENT DECISIONS SHOULD BE REJECTED

For years, the NRTC has attempted in this and other related matters to further its own private litigation interests by intruding on the pretense that it is arguing on behalf of Hawaii that DIRECTV has violated the Commission's geographic service rules. Along the way, the NRTC has asserted that DIRECTV must move 22 programming channels from a satellite that cannot "see" Hawaii at the 101° W.L. orbital position (such as DIRECTV 2) to a satellite that can (DIRECTV 1R), merely because NRTC believes that its position in private litigation against DIRECTV can be improved.⁷

As a threshold matter, the NRTC has no standing in this proceeding. NRTC does not serve Hawaii, has no constituent members in Hawaii, and no interest whatsoever in this proceeding other than a transparent attempt to advantage itself in a private contractual dispute.

Nor does the NRTC have any right to dictate DIRECTV's business decisions regarding the programming that will be carried on specific DIRECTV satellites. The Commission's rules do not permit or even contemplate such second-guessing of programming and fleet management decisions. To the contrary, in the *DBS Rules Order*, the Commission stated that it would "avoid dictating system design or business plans" in evaluating a DBS operator's compliance with its

⁷ See, e.g., Comments of the National Rural Telecommunications Cooperative ("NRTC"), MB Docket No. 03-82 (May 9, 2003), at 6.

geographic service rules.⁸ And in general, the Commission defers to satellite operators' judgment in rearranging "satellites in their fleet to reflect business and customer considerations."⁹

The NRTC's general evaluation of whether DIRECTV's programming in Hawaii is "reasonably comparable" to the programming offered to CONUS customers, or the NRTC's specific recommendations as to the most efficacious way to transition the 22 additional programming channels that are the subject of its private litigation with DIRECTV to satellites that can be accessed by Hawaii consumers, are of no relevance and moot in any event. As set forth below, DIRECTV has committed unequivocally to offer these 22 additional programming channels to Hawaii, contingent only upon the successful launch of the DIRECTV 7S spot beam satellite in the fourth quarter of this year.

DIRECTV also wishes to clear up a point (one of many) on which the NRTC has been continually confused. As DIRECTV explained in its Opposition in this proceeding, and has explained to the Commission for several years now,¹⁰ DIRECTV has been unwilling to subject

⁸ *DBS Rules Order* at ¶ 72.

⁹ *Amendment of the Commission's Space Station Licensing Policies*, IB Docket No. 02-34 (rel. June 20, 2003), at ¶ 15 (citing *GE American Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 23538, 23588, ¶ 11 (Int. Bur. 2000); *Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 4497 (Com. Car. Bur. 1990)).

¹⁰ *See, e.g.*, DIRECTV Enterprises, Inc., File No. SAT-LOA-2000505-0086 (DIRECTV 5) (June 30, 2000) (memorializing June 29 *ex parte* meeting and presentation to FCC staff and representatives of the State of Hawaii, and specific discussion of limitations on program offering due to NRTC litigation); DIRECTV Opposition and Reply Comments, File No. SAT-LOA-2000505-0086 (DIRECTV 5) (July 17, 2000), at 9, n.17 (noting that DIRECTV is "constrained by ongoing litigation and certain programmer packaging agreements from including certain additional programming services in the Hawaii Choice lineup" and that DIRECTV "expects this situation to improve over time"); Further *Ex Parte* Response of DIRECTV, Inc., File No. SAT-LOA-2000505-0086 (DIRECTV 5) (Sept. 20, 2000), at 2 (responding to identical NRTC allegations as those raised in this proceeding, and observing

itself to substantial economic exposure in the NRTC litigation to shift programming around and move some of the 22 programming channels at issue¹¹ onto the DIRECTV 1R satellite *precisely* because of the NRTC's view, expressed in this very proceeding, that such a move would cause "DIRECTV's existing contractual arrangement with NRTC" to "last longer."¹² However, the absence of the 22 programming channels at issue has not affected and should not be considered to affect DIRECTV's compliance with the Commission's geographic service rules.¹³ While it is certainly desirable for those 22 channels to be added to DIRECTV's Hawaii service packages – and indeed, DIRECTV has committed to add them – a review of DIRECTV's current Hawaii service packages illustrates that it is reasonably comparable to CONUS offerings *independent* of whether those channels are added. While section 25.121(c) requires DBS operators "who do not provide service to Alaska and Hawaii" to proffer analyses of technical infeasibility or economic

that "DIRECTV has explained to the Commission the circumstances surrounding its current litigation with the NRTC" and "sees no need to comment further").

¹¹ It is telling regarding NRTC's purpose and candor that NRTC's interest in having specific programming provided to Hawaii does not extend to customers in territories served by the NRTC. For example, NRTC's latest *ex parte* presentation to the staff includes arguments that WTBS, Headline News and the Cartoon Network were among the most popular networks not available in Hawaii and are essential to customers. *See Ex Parte of the NRTC Presentation*, MB Docket No. 03-82, IB Docket No. 98-21, File No. SAT-MOD-20030613-00120 (July 10, 2003), PowerPoint slides at 5. However, in its litigation with DIRECTV, NRTC requested that these three networks, and one other of the 22, be **removed** from the "core" package of programming provided to customers in its territories so that it could sell HBO, Showtime, Cinemax and The Movie Channel – programming DIRECTV already provides to Hawaii. Moreover, NRTC's hired expert asserted on behalf of the NRTC that the absence of these three networks would have **no impact** on customers in NRTC's territories because these networks are not important to consumers.

¹² NRTC Comments at 5.

¹³ Hawaii already receives the Disney Channel. Four of the other "core" programs identified by NRTC consist of distant network signals that are governed by Section 119 of the Copyright Act and will have little if any effect on Hawaii subscribers. Four other "core" programs were identified by the NRTC as vastly inferior to receiving HBO, Showtime, Cinemax and the Movie Channel, and, if NRTC is successful in its litigation, will be dropped from the 22 "core" programs in the NRTC contract.

unreasonableness justifying the lack of service,¹⁴ no such analysis or showing is required in this case because DIRECTV is already at a threshold level of compliance with the Commission's geographic service rules.¹⁵

Finally, DIRECTV once again observes that that there is absolutely no merit to the NRTC's truly puzzling assertion – submitted recently in multiple power point presentations to a number of Commission representatives – that DIRECTV “has not been candid with the Commission” regarding its level of service to Hawaii and the reasons for its need to create special Hawaiian service packages.¹⁶ To the extent that litigation with the NRTC has been cited by DIRECTV as one reason that certain programming channels have not yet been moved to satellites capable of serving Hawaii, DIRECTV has at all times been candid and consistent with both the Commission and Hawaii on this point. For example, DIRECTV met with staff *and* with counsel for Hawaii in June, 2000, in order to explain the NRTC situation as well as other technical constraints on DIRECTV's ability to offer programming packages to Hawaiian customers identical to those offered to CONUS customers.¹⁷ This was followed by subsequent

¹⁴ 47 C.F.R. § 25.148(c).

¹⁵ For this reason, Hawaii's call for DIRECTV “to provide economic and financial analysis supporting its arguments,” Response of the State of Hawaii at 7, is without merit. Whether the potential economic harm to which DIRECTV could be subject in the NRTC litigation as a result of the Commission forcing an immediate shift in DIRECTV programming from certain DIRECTV satellites to others could qualify under the “economic unreasonableness” exception to the geographic service requirements is a theory that, while eminently plausible, need not be considered by the Commission in this case, since the programming channels referenced by the NRTC and Hawaii will be made available to Hawaii in any event upon the launch of DIRECTV 7S.

¹⁶ *See, e.g., Ex Parte Presentation of the NRTC*, MB Docket No. 03-82, IB Docket No. 98-21 and File No. SAT-MOD-20030613-00120 (July 10, 2003), at 3.

¹⁷ DIRECTV Enterprises, Inc., File No. SAT-LOA-2000505-0086 (DIRECTV 5) (June 30, 2000) (memorializing June 29 *ex parte* meeting and presentation to FCC staff and

pleadings and *ex parte* exchanges among Hawaii, the NRTC and DIRECTV expressly debating the merits of DIRECTV's position.¹⁸ On November 27, 2000, in the *Order and Authorization* for the launch and operation of the DIRECTV 5 satellite, the Commission noted Hawaii's dissatisfaction with "DIRECTV's claim that it is constrained from offering certain programs due to pending litigation with a distributor, the [NRTC], involving programming packaging agreements."¹⁹ Indeed, as recently as its June 17, 2003 letter regarding DIRECTV's request of an STA to move and operate the DIRECTV 1 and DIRECTV 6 satellites, the NRTC itself argued that "DIRECTV candidly admitted on June 30, 2000, that certain 'litigation issues' stemming from its dispute with NRTC 'limit[ed]' its program offerings to Hawaii."

To the extent that the litigation with the NRTC remains a reason that certain programming cannot be moved to DIRECTV 1R at this time, DIRECTV fully explained the point again in its Opposition in this proceeding.²⁰ Thus, DIRECTV has taken a consistent position – acknowledged in meetings with Commission staff and to Hawaii directly, and

representatives of the State of Hawaii, and specific discussion of limitations on program offering due to NRTC litigation).

¹⁸ See, e.g., DIRECTV Opposition and Reply Comments, File No. SAT-LOA-2000505-0086 (DIRECTV 5) (July 17, 2000), at 9, n.17 (noting that DIRECTV is "constrained by ongoing litigation and certain programmer packaging agreements from including certain additional programming services in the Hawaii Choice lineup" and that DIRECTV "expects this situation to improve over time"); Further *Ex Parte* Response of DIRECTV, Inc., File No. SAT-LOA-2000505-0086 (DIRECTV 5) (Sept. 20, 2000), at 2 (responding to identical NRTC allegations as those raised in this proceeding, and observing that "DIRECTV has explained to the Commission the circumstances surrounding its current litigation with the NRTC" and "sees no need to comment further").

¹⁹ DIRECTV Enterprises, Inc., Order and Authorization, SAT-LOA-20000505-00086 (rel. Nov. 27, 2000), at ¶ 7. The Commission rejected the calls by Hawaii and the NRTC to delay the launch of DIRECTV 5. Hawaii also opposed the launch of the DIRECTV 4S satellite. In responding to Hawaii's arguments made in the DIRECTV 5 docket, including its explanation of the NRTC litigation. See Opposition of DIRECTV Enterprises, Inc., File No. S2430-SAT-LOA-20010518-00045 (Aug. 10, 2001), at 4 n.15.

²⁰ Opposition of DIRECTV, Inc. (Apr. 24, 2003) at 12-15.

reflected in publicly-filed *ex parte* notices, pleadings and in FCC Orders, over a period of more than three years – and which the NRTC described as “candid” not more than a month ago (when that description apparently suited its then-purpose). Its claim today that DIRECTV lacks candor is ridiculous, insulting and without merit. Indeed, in assessing the candor of the parties, the Commission should simply ask why the NRTC has expended many pages of power-point presentations and many hours of meeting time with Commission staff on the issue of the adequacy of DIRECTV’s service in Hawaii, when the NRTC *does not have a single member or subscriber in the State*. The reason is simply that the NRTC is motivated by its own litigation agenda, which DIRECTV agrees is a matter “properly left to the courts, not the Commission,”²¹ and can be summarily dismissed here.

III. DIRECTV’S ACTION PLAN TO FURTHER IMPROVE SERVICE TO HAWAII

A. DIRECTV Commits to Provide Hawaii With at Least 22 Additional Programming Channels by the First Quarter of 2004

In its Opposition, DIRECTV set forth different options that, independently or collectively, would allow it to add substantially to the number of programming channels offered by DIRECTV in Hawaii, including: (1) movement of programming to DIRECTV 1R upon resolution of the NRTC litigation; (2) launch of an additional satellite, DIRECTV 7S, at the end of this year; and (3) the possible acquisition of additional satellite capacity.²² Hawaii criticized DIRECTV in its Response, however, because it believed that each of DIRECTV’s proposed options was “qualified excessively.”²³ This criticism is unwarranted.

²¹ Comments of the NRTC (May 9, 2003), at 7.

²² Opposition of DIRECTV, Inc. (Apr. 24, 2003) at 11.

²³ Hawaii Response at 2.

DIRECTV clarifies herein its commitment to add to its Hawaii programming packages at least the 22 programming services at issue in the NRTC litigation by the first quarter of 2004 upon the successful launch of DIRECTV 7S. The precise satellites that DIRECTV will use need not be decided upon at this time, but could entail the use of DIRECTV 1R (upon successful resolution of the NRTC litigation), or the provision of the additional programming from another satellite upon the successful launch of DIRECTV 7S (if the NRTC litigation is not resolved). Thus, by the first quarter of 2004, DIRECTV will expand its service offerings to Hawaii by at least 22 channels, and its service to Hawaii will be nearly identical to the service that DIRECTV provides to CONUS subscribers.

B. DIRECTV Has Made Significant Efforts to Provide Its New High-Definition Programming Package to Hawaii Within The Same Time Frame As CONUS Subscribers

On July 1, 2003, DIRECTV launched a new high-definition ("HD") programming package that includes ESPN HD, Discovery HD Theater, HDNet and HDNet Movies, available by subscription for \$10.99 per month. In addition to these HD channels, subscribers to the HD package will also receive special events broadcast in HD, such as coverage of the Masters Tournament, NBA games and NBA TV programming blocks.

DIRECTV launched this HD programming package due to a groundswell of demand for HD programming, and it is anticipated that the new HD package will enhance DIRECTV's desirability on Hawaii. On June 11, 2003, DIRECTV requested Special Temporary Authority ("STA") to replace its DIRECTV 1 satellite at 110° W.L. with DIRECTV 6, a satellite with Hawaii coverage, and to move the DIRECTV 1 satellite to 101° W.L. These moves will allow DIRECTV to offer its new HD package to *all* U.S. subscribers, including consumers residing in Hawaii.

The Commission granted DIRECTV's STA request on July 2, 2003,²⁴ and DIRECTV has now positioned and is operating DIRECTV 6 at 110° W.L. Thus, DIRECTV's DBS subscribers in Hawaii are now able to receive its new HD package.

C. Additional Actions by DIRECTV

Hawaii raised certain issues in its pleading that are administrative in nature and relatively easy for DIRECTV to remedy. Ideally, Hawaii would have approached DIRECTV directly regarding these issues rather than seek relief at the Commission. That said, DIRECTV appreciates Hawaii's efforts and, in response, has taken or will take the following actions:

Addition of WGN to Hawaii Programming Packages. In its Response, Hawaii alleges that DIRECTV is "withholding" from Hawaii four non-NRTC implicated programming channels from Hawaii.²⁵ This assertion is incorrect. In fact, DIRECTV already provides three of the four channels – C-SPAN , Lifetime Television, and Nickelodeon – to Hawaii. The fourth channel, WGN, was not being offered to Hawaii as of the date that the Hawaii Petition was filed. However, as of June 16, 2003, DIRECTV commenced offering WGN in Hawaii.

Additional Retail Stores. As explained in its Opposition, DIRECTV has no control over whether its national retailers, or any retailers, carry DIRECTV equipment in their Hawaii locations. Notwithstanding this fact, DIRECTV is pleased to inform the Commission that, in 2003, Mountain Satellite intends to open six stores at various Hawaii locations to sell DIRECTV equipment and services. DIRECTV expects that this development will raise substantially DIRECTV's profile in Hawaii.

²⁴ *DIRECTV, Inc., Request for Special Temporary Authority to Move and Operate Direct Broadcast Satellites to 110° W.L., Order* (rel. July 2, 2003). The *Order* found these moves in the public interest in part because they would help "provid[e] U.S. consumers with HDTV programming." *Id.* at ¶ 4.

²⁵ Response of the State of Hawaii at 5.

Availability of DIRECTV Equipment for Hawaii Residents on the DIRECTV Web Site.

At the time that Hawaii submitted its Petition, Hawaii consumers were unable to purchase DIRECTV equipment on the DIRECTV web site because of the need for special equipment and professional installation associated with Hawaii service. DIRECTV is in the process of changing this situation, such that Hawaii residents will soon be able to purchase equipment directly from the DIRECTV website.

Promotions. Certain promotions that DIRECTV has offered in the past were not made available to Hawaii residents, an administrative oversight that was due to the fact that DIRECTV provides distinct programming packages to Hawaii that were not linked up with the promotions associated with DIRECTV's CONUS packages. DIRECTV has addressed this disconnect and will work to ensure that Hawaii is included in future promotions (or, if necessary due to package distinctions, comparable promotions).

Corrections to the DIRECTV Web Site. The Hawaii Petition informed DIRECTV of certain inaccuracies in the DIRECTV web site. DIRECTV has engaged in a top-down review of the information on its website to remedy these inaccuracies. In particular, DIRECTV is taking steps to ensure that the channel lineup for Hawaii programming packages listed on its website is accurate. In addition, DIRECTV is working to revise the store locator function on its website to correctly list Mountain Satellite and other retailers that sell DIRECTV products and services in Hawaii. In this way, DIRECTV will better facilitate access to DIRECTV in Hawaii.

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IV. CONCLUSION

For the foregoing reasons, and for the reasons stated in its Opposition, DIRECTV respectfully requests that the Commission deny the Hawaii Petition and the Microcom Petitions.²⁶

Respectfully submitted,



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Dated: July 21, 2003

²⁶ DIRECTV provides Alaska residents with programming packages that are identical to those offered to all other U.S. consumers, albeit with a larger satellite dish in some portions of that state. Microcom has not raised any credible fact or argument to the contrary, nor has the State of Alaska in responding to Microcom's Petitions. *See* Comments of the State of Alaska (April 24, 2003). Indeed, in a supplemental e-mail, Microcom now has *admitted* that "it cannot reliably say whether [DIRECTV] programming is available or not available" in Alaska since "DIRECTV understands the engineering of their satellite fleet better than we do." *Undated e-mail from Microcom*, MB Docket No. 03-82 (filed June 6, 2003). In light of this further confirmation of the lack of support for Microcom's allegations, Microcom's Petitions in this proceeding should be dismissed.