

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

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JUL 19 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
DIRECTV Enterprises, Inc. )  
 )  
for Authority to Launch and Operate )  
DIRECTV 4S (USABBS-13) )

File No. S2430 SAT-LOA-20010518-00045

Received

JUL 25 2001

Satellite Policy Branch  
International Bureau

PETITION TO DENY OR HOLD IN ABEYANCE  
OF THE STATE OF HAWAII

The State of Hawaii (“the State”),<sup>1</sup> by its attorneys and pursuant to Section 25.154 of the Commission’s rules, 47 C.F.R. § 25.154, hereby petitions to deny or otherwise hold in abeyance the above-captioned application for launch and operating authority filed by Directv Enterprises, Inc. (“Directv”) on May 18, 2001.<sup>2</sup>

**I. INTRODUCTORY SUMMARY**

Directv seeks Commission approval to launch and operate Directv 4S—its seventh Direct Broadcast Service (“DBS”) satellite. It claims that the 4S satellite is in the public interest because it will provide expanded capacity, facilitate the distribution of local signals to existing

<sup>1</sup> 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.

<sup>2</sup> See *Satellite Policy Branch Information: Applications Accepted for Filing*, Public Notice, Report No. SAT-LOA-20010518-00045 (June 19, 2001).

and new subscribers, allow for more programming, and provide a more complete substitute to cable service.<sup>3</sup>

Nothing in Directv's application, however, describes how it will improve the provision of DBS service to the state of Hawaii. This is no surprise. As the State has repeatedly emphasized, Directv has engaged in a pattern of overt discrimination against the State of Hawaii.<sup>4</sup> Directv has not and is not providing core programming in Hawaii comparable to that provided to the mainland. In other words, Directv is in direct and continuing violation of Section 100.53 of the Commission's rules.<sup>5</sup> Further, Directv manifests no intent to comply with the Commission's rules. Therefore, the Commission should not reward Directv by authorizing it to use scarce orbital space for its 4S satellite because it has failed to meet its existing statutory and regulatory obligations.

At the very least, the Commission should defer its decision on Directv's application until an order is released in the pending Part 100 rulemaking.<sup>6</sup> Only then will the Commission be able to ensure the provision of adequate DBS to the people of Hawaii based on a clear understanding of what comprises true DBS "service."

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<sup>3</sup> See Directv Application at 5-6.

<sup>4</sup> See, e.g., *Petition to Deny of the State of Hawaii*, File No. SAT-LOA-20000505-00086, at 4-5 (July 6, 2000).

<sup>5</sup> See 47 C.F.R. § 100.53 (b) which states: "[t]hose 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>6</sup> See *The Commission Requests Further Comment in Part 100 Rulemaking Proceeding on Non-Conforming Use of Direct Broadcast Satellite Service Spectrum*, Public Notice, FCC 00-426 (rel. Dec. 8, 2000). See also *In re Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd 6907 (1998).

## II. THE APPLICATION SHOULD BE DENIED BECAUSE DIRECTV IS IN VIOLATION OF CURRENT REGULATIONS

As the Commission has previously acknowledged, Sections 151<sup>7</sup> and 307(b)<sup>8</sup> of the Communications Act and Section 100.53 of the Commission's rules obligate DBS licensees to provide "full service"<sup>9</sup> to Hawaii in order to "provide important MVPD competition" for cable television<sup>10</sup> and to provide "equitable distribution of service throughout the nation."<sup>11</sup>

Directv has a long history of refusal to serve the people of Hawaii adequately. While Directv initiated DBS service to the mainland in 1996, it did not begin transmitting signals to Hawaii until late in 2000. Even now, Directv's service offerings are not attractive to most consumers and are not being sold in significant numbers. As recently as this March, the State of Hawaii has reported to the Commission on the inadequate provision of service by Directv.<sup>12</sup> Directv's DBS offerings in the State are not comparable with the programming that is available in the rest of the country and are 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 many of the most popular and informative

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<sup>7</sup> Section 151 of the Communications Act of 1934 charges the Commission with ensuring United States citizens a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service." See 47 U.S.C. § 151 (emphasis added).

<sup>8</sup> Section 307(b) of the Communications Act directs that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." See 47 U.S.C. § 307(b) (emphasis added).

<sup>9</sup> See *Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9761 (1995) ("1995 DBS Order").

<sup>10</sup> *Direct Broadcast Satellite Service*, Notice of Proposed Rule Making, FCC 98-26, ¶ 33 (Feb. 26, 1998) ("1998 DBS NPRM") (indicating that "[w]e believe that the provision of service to Alaska and Hawaii will provide important MVPD competition in these markets.").

<sup>11</sup> See *Direct Broadcast Satellites*, 90 FCC 2d 676, 680 (1982) ("1982 DBS Order") (citing 47 U.S.C. § 307(b)) (noting "the statutory goal of providing equitable distribution of service throughout the nation").

<sup>12</sup> See *Written Ex Parte filed by Squire, Sanders & Dempsey to the Commission*, IB Docket No. 98-21 (Mar. 16, 2001)

programming available such as CNN, Headline News, The Weather Channel, Discovery Channel, ESPN, ESPN 2, TBS, TNT, and USA Network. Such programming is routinely provided to all mainland customers. Directv refuses to provide these important programming options to Hawaii not because of a contractual or judicial obligation, but apparently solely to enhance its perceived strategic posture in civil litigation against the National Rural Telecommunications Cooperative (“NRTC”), a Directv distributor. In addition, Directv has exclusive rights to a number of popular programming services such as “NFL Sunday Ticket,” but Directv does not provide these services in Hawaii, making them completely unavailable to consumers in the State.

Although Directv is offering a bilingual package that includes 20 Spanish language channels, the service has only a limited potential subscriber base in Hawaii and requires the purchase of a second satellite dish – doubling the start-up costs as compared to consumers in the rest of the United States. This programming is apparently offered only because of Directv’s interest in providing service to the California market and does not reflect a genuine intent to better serve Hawaii. Once again, Directv focuses on every U.S. market except Hawaii. Further, while Directv claims to offer 19 premium movie channels on an a la carte basis, all 19 channels appear to be time shifted versions of HBO and Showtime. Directv’s offerings, in the aggregate, fall far short of the programming packages that it makes available in the mainland and also are not comparable to the programming made available by major cable operators in the State.<sup>13</sup>

Directv acknowledges in its application that DBS is intended to be competitive with terrestrial cable television service.<sup>14</sup> In fact, Directv fashions itself as imminently becoming a

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<sup>13</sup> *See Id.*

<sup>14</sup> *See* Directv Application at 7 (reiterating the Commission’s view that DBS is the principal competitor to cable).

“complete substitute to incumbent cable system offerings.”<sup>15</sup> Directv is apparently aware, however, that its limited programming is not even arguably competitive with cable television services in Hawaii because its marketing focus is very different from that on the mainland. For example, Directv does not use national retail outlets to market its services in Hawaii as it does on the mainland. *None* of Directv’s national account holders (such as Circuit City, Sears and Radio Shack) reportedly offer Directv’s service in their Hawaiian outlets.<sup>16</sup> Instead, Directv relies on fewer than a handful of independent distributors that report weak Directv sales.<sup>17</sup>

Directv seeks to locate its 4S satellite at 101.2° W.L.<sup>18</sup> At this orbital location, the satellite will be able to provide service to Hawaii. There is no indication in Directv’s application, and, based on history, the State has no reason to believe that Directv will use its 4S satellite to provide service to the State that is even remotely comparable to the service that will be provided to the continental United States (“CONUS”). In fact, Directv states that the 4S satellite is “specifically intended to provide additional local broadcast channel programming capacity for Directv’s existing DBS system.”<sup>19</sup> Directv has made only token and wholly inadequate gestures to provide meaningful and truly competitive service to the State.

The Commission must ensure progress in the quantity and quality of DBS services to Hawaii. In order to accomplish this, the Commission must not reward applicants that intentionally disregard the Commission’s geographic anti-discrimination rules. The

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<sup>15</sup> *See. Id* at 1-2.

<sup>16</sup> *See Written Ex Parte filed by Squire, Sanders & Dempsey to the Commission*, IB Docket No. 98-21 at 2 (Mar. 16, 2001).

<sup>17</sup> *Id.*

<sup>18</sup> *See* Directv Application at 1.

<sup>19</sup> *See Id.* at 4.

programming package offered to Hawaii need not be identical to that offered to every other CONUS location, but it must be of equal value and be at prices equivalent to those charged in the CONUS. It certainly must not be a service that, by its very structure, discriminates in the service provided to Hawaii. The State urges the Commission to further the public interest by requiring Directv to promptly fulfill its geographic service obligations. Denying Directv's application for authority to launch the 4S satellite and instructing the licensee to file a new application that properly acknowledges and addresses its geographic service obligations could accomplish this.

### **III. ALTERNATIVELY, A DECISION ON THE APPLICATION SHOULD BE DELAYED PENDING THE PART 100 ORDER**

Realistically, Directv will use the 4S satellite to improve service to Hawaii only if the Commission makes clear in the upcoming Part 100 Order that DBS licensees are obligated to provide service to the Hawaii that is truly comparable to the services available to the rest of the United States.<sup>20</sup> In its upcoming order, the Commission's geographic service rules necessarily must require the provision of "full service"<sup>21</sup> to Hawaii in order to "provide important MVPD competition" for cable television<sup>22</sup> and "equitable distribution of service throughout the nation"<sup>23</sup> as called for in the Communications Act.<sup>24</sup> As such, it would be prudent to delay a decision on Directv's instant application until the Commission has the opportunity to reinforce the

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<sup>20</sup> See Written Ex Parte filed by Squire, Sanders & Dempsey to the Commission, IB Docket No. 98-21 (filed Mar. 16, 2001) at 3.

<sup>21</sup> *Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9761 (1995) ("1995 DBS Order").

<sup>22</sup> *Direct Broadcast Satellite Service*, Notice of Proposed Rule Making, FCC 98-26, ¶ 33 (Feb. 26, 1998) ("1998 DBS NPRM") (indicating that "[w]e believe that the provision of service to Alaska and Hawaii will provide important MVPD competition in these markets.").

<sup>23</sup> *Direct Broadcast Satellites*, 90 FCC 2d 676, 680 (1982) ("1982 DBS Order") (citing 47 U.S.C. § 307(b)).

<sup>24</sup> See 47 U.S.C. § 151.

geographic regulatory obligations that accompany DBS authorization. Only then will Directv be in the position to make any modifications and adjustments *prior* to launch in order to provide adequate service to Hawaii.

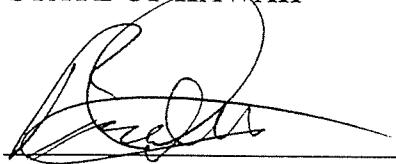
**IV. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Commission deny or, in the alternative, hold in abeyance Directv's request to launch and operate its 4S satellite as requested in the above-captioned application.

Respectfully submitted,

**THE STATE OF HAWAII**

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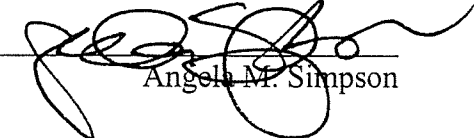
July 19, 2001

**CERTIFICATE OF SERVICE**

I hereby certify that this 19<sup>th</sup> day of July, 2001 true and correct copies of the foregoing were served via hand delivery or first class mail on the following:

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