

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
EchoStar Satellite Corporation)
)
Application for Authority to Make)
Minor Modifications to Direct)
Broadcast Satellite Authorization)
)
Application for Special Temporary)
Authority to Operate a Direct Broadcast)
Satellite Over the Even-Numbered)
Channels at the 148° Orbital Location)

File No. SAT-MOD-20011025-00090

File No. SAT-STA-20011025-00091

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Satellite Policy Branch
International Bureau

COMMENTS OF
THE STATE OF HAWAII

The State of Hawaii (“the State”),¹ by its attorneys and pursuant to Section 25.154 of the Commission’s Rules, 47 C.F.R. § 25.154, hereby comments on the above-captioned applications of EchoStar Satellite Corporation (“EchoStar”) to make modifications to its DBS authorizations and for limited waiver of the Commission’s geographic service rules.²

The State has no objection to the conditional grant of EchoStar’s applications. The State observes, however, that a major reason why EchoStar needs a waiver of the geographic service rules is because, after almost four years of delay, the Commission has

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 Public Notice, “*Satellite Policy Branch Information: Application Accepted for Filing*,” Report No. SAT-00090 (Nov. 16, 2001).

not yet clarified its rules through the issuance of an order in the Part 100 rule making proceeding. In consolation, however, the State also observes that one of the justifications that EchoStar uses in support of its waiver request provides instructive guidance for the Commission in reaching a conclusion in the Part 100 proceeding.

I. THE COMMISSION SHOULD RELEASE AN ORDER IN THE PART 100 PROCEEDING THAT ENDS THE AD HOC PROCESS OF ENFORCING THE GEOGRAPHIC SERVICE RULES ON A CASE-BY-CASE AND APPLICATION-BY-APPLICATION BASIS.

As noted above, the State has no objection to the conditional grant of EchoStar's above-captioned request for modification of its DBS fleet and waiver of the geographic service rules. In issuing such a waiver, the Commission should impose the same conditions on EchoStar's operations as were adopted for EchoStar's previous waiver request.³

The State accedes to EchoStar's wavier request because, while EchoStar's service to consumers to the State is not in compliance with the Commission's regulations, it has improved significantly in recent years. EchoStar makes available its America's Top 100 subscriber package in Hawaii for about the same cost as on the mainland. The major remaining shortcoming in EchoStar's service is that Hawaii residents are unable to receive EchoStar's America's Top 150 package on terms that are remotely comparable to those in the mainland.

³ See *EchoStar Satellite Corporation, Directsat Corporation and EchoStar DBS Corporation*, 13 FCC Rcd. 8595, 8609 (1998) ("1998 EchoStar Waiver Order") (indicating that any satellite replacing the satellite that is the subject of the waiver at 148° W.L. will immediately be subject to 47 C.F.R. §100.53 (b) obligations; (2) if EchoStar stops providing service to Hawaii from 119° W.L., any EchoStar satellite at 148° W.L. will immediately incur 47 C.F.R. §100.53(b) obligations; and (3) for all other satellites subject to §100.53, EchoStar's requirements remain).

While the State is not objecting to EchoStar's current waiver request, however, the State observes that it has been forced to file numerous pleadings in recent years involving a long list of DBS application proceedings initiated by both EchoStar and Directv. The State has been compelled to participate in these proceedings for three reasons.

First, DBS licensees, particularly Directv, have resisted compliance with the Commission's geographic service rules and have directly challenged their scope, sometimes arguing that the rules require nothing more than the broadcast of a test pattern to consumers in the State.

Second, the existing geographic service rules focus on specific orbital locations, rather than on the entire package of services that each DBS licensee provides with its network. For example, Section 100.53(b) of the Commission's rules requires the provision of DBS service to Alaska and Hawaii from any orbital position that is acquired after January 19, 1996, if such service is technically feasible from the acquired orbital location.⁴

Because of the technical focus of the existing rules, DBS licensees have argued that the Commission must focus on individual satellites when assessing compliance with the rules, but these same operators point to the efficiencies of their entire network when defending individual acts of non-compliance. At the same time, the State has been forced

⁴ 47 C.F.R. § 100.53(b) (2000). In addition, Section 100.53(a) of the Commission's rules requires the provision of DBS to Alaska and Hawaii from any one of a licensee's orbital positions if those positions were acquired prior to January 19, 1996. *See* 47 C.F.R. § 100.53(a) (2000).

to carefully monitor the fleet management of the DBS licensees – an unwarranted expense to the State’s coffers.

The third reason why the State has been compelled to participate in so many DBS application proceedings is because the Commission has been unable to complete an order in its Part 100 rule making proceeding that clarifies and improves the geographic service requirements. The Commission should not belabor the Part 100 proceeding any longer. Instead, the Commission should promptly issue an order that reinforces its geographic service rules. Fortunately, an objectively clear approach to revising the Commission’s geographic service requirements can be found within EchoStar’s own waiver application.

II. THE GEOGRAPHIC SERVICE RULES SHOULD REQUIRE THE PROVISION OF A DBS LICENSEE’S “BACKBONE CABLE AND SUPERSTATION” PROGRAMMING PACKAGES TO CONSUMERS IN ALL FIFTY STATES.

The State has long argued that the Commission’s existing geographic service rules mandate the provision of “full service” to consumers in Alaska and Hawaii – meaning the provision of comparable, but not necessarily identical, programming. In making this argument, the State has repeatedly urged the Commission to enforce its geographic service rules by focusing on the core programming packages that EchoStar and Directv make available to customers in every one of the mainland forty-eight states.

EchoStar endorses this same approach in its waiver request. EchoStar argues that its waiver request is justified because it is providing its “backbone cable and superstation package to residents of Alaska and Hawaii from its 119° W.L. orbital location.”⁵

⁵ *Application for Minor Modification of DBS Authorization*, FCC File No. SAT-MOD-20011025-00090, at 10 n.18 (Oct. 25, 2001).

Furthermore, as EchoStar observes, the International Bureau also endorsed this approach when it granted EchoStar a previous waiver of the geographic service rules. The Bureau concluded that the waiver would “serve the public interest because it will enable subscribers in Hawaii to receive the same backbone programming as subscribers in the mainland.”⁶

Of course, such a regulatory approach raises a fundamental question: how to define and identify the core “backbone cable and superstation” programming packages that would be covered by such a rule? The answer is easy. The Internet advertising for EchoStar and Directv identify their core programming packages available in every one of the forty-eight mainland states. For example, EchoStar advertises AT 40, AT 100 and AT 150,⁷ while Directv offers Total Choice, Total Choice Movies and Total Choice Platinum.⁸

As indicated in the following charts, EchoStar provides some of its core programming packages to consumers in Hawaii, while Directv offers none of them. Instead, Directv offers a different programming package called Hawaii Choice, which lacks many of Directv’s most popular and informative programming, such as CNN, Headline News, The Weather Channel, Discovery Channel, ESPN, ESPN 2, TBS, TNT and USA Network.

⁶ *Id.* (quoting 1998 EchoStar Waiver Order at 8599).

⁷ See <http://www.dishnetwork.com/content/programming/packages/index.shtml>.

⁸ See <http://www.directv.com/packages/packagespages/0,1336,516,00.html>.

EchoStar's Core Programming Packages		
Programming Package	Available in Forty-eight Mainland States	Available in Hawaii
AT 50	Yes	Yes
AT 100	Yes	Yes
AT 150	Yes	No
America's Everything Pack	Yes	No

Directv's Core Programming Packages		
Programming Package	Available in Forty-eight Mainland States	Available in Hawaii
Total Choice	Yes	No
Total Choice Movie	Yes	No
Total Choice Platinum	Yes	No

The solution to this problem is clear. The Commission should adopt immediately a revised geographic service rule that prohibits discrimination against residents in Alaska and Hawaii by requiring DBS licensees to make available the same programming in Alaska and Hawaii as is made available to consumers in all forty-eight mainland states. Enforcement of such a rule would be as simple as reviewing the DBS licensee's websites, and checking off the tables provided on the previous page of these comments. Furthermore, adoption of this clear and concise regulatory requirement would finally bring an end to the long series of contested proceedings that has been necessitated by the failure of DBS licensees to comply with the Commission's existing geographic service requirements.

III. CONCLUSION

The State has no objection to the conditional grant of EchoStar's modification application and requested waiver of the Commission's geographic service rules. The State urges the Commission to eliminate the need for such waivers, however, by promptly adopting an order in the Part 100 rule making proceeding, which clarifies and improves the Commission's geographic service requirements. Furthermore, the State urges the Commission to adopt a new geographic service rule that focuses on the core programming packages made available by DBS licensees to consumers in the forty-eight mainland states, but not to consumers in Alaska and Hawaii.

Respectfully submitted,

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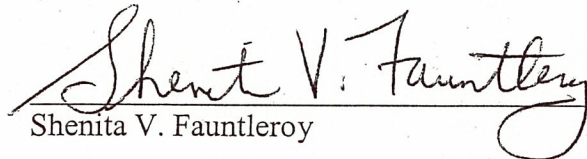
Certificate of Service

I, Shenita V. Fauntleroy, do hereby certify that on this 17th day of December, 2001, I have caused a copy of the foregoing "Comments of The State of Hawaii" in SAT-MOD-20011025-00090 and File No. SAT-STA-20011025-00091 to be served by first class mail to:

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